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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 185.

SAMUEL McMILLEN, RONALD MORRISON, AND EBEN SMITH, PLAINTIFFS IN ERROR,

vs.

THE FERRUM MINING COMPANY, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

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STATEMENT OF THE CASE.

This was an adverse ejectment suit brought November 20, 1897, by plaintiffs in error in the district court of the fifth judicial district in Lake county, Colorado, as the owners of the Eulalia Lode mining claim, in support of their adverse claim, filed in the United States land office at Leadville, October 21, 1897, against the application for patent by the defendant in error for the Golden Rod Lode mining claim.

The case was tried February 7 and 8, 1900, resulting in a verdict and judgment in favor of defendant in error (R., 3 and 4).

An appeal was taken to the supreme court of Colorado by plaintiff in error, and the judgment was affirmed December 7, 1903 (R., 402).

That afterwards and upon February 1, 1904, the case was brought by writ of error to the Supreme Court of the United States (R., 438).

The assignment of errors appears on folios 403 to 421, Record.

The Eulalia Lode mining claim was located upon May 30, 1893, in the name of John Kennedy, by Samuel McMillen, one of the plaintiffs in error, and John McCombe, the location certificate of the Eulalia claim being recorded June 17, 1893 (R., fols. 149–150). It consisted of three fractional parts of a full mining claim, separated one from the other by a space of 300 and 400 feet (plat, R., fol. 144), designated in said adverse plat as tracts A, B, and C.

Tract A.—Area, 0.165 A.

Tract B.—Area, 1.074 A.

Tract C.—Area, 2.001 A.

The ground embraced in the Eulalia Lode mining claim was the abandoned and forfeited territory inclosed within the lines of the Winter lode, United States survey No. 427, application No. 279, and the surveyed lines of the said Eulalia lode were identical with the lines of the Winter lode in its plat as approved by the surveyor general of Colorado in its application for United States patent June 25, 1879. This application for patent for the Winter lode was cancelled by order and finding of the honorable Commissioner of the General Land Office after protest and hearing had of John Kennedy, locator and owner of the Eulalia lode, *vs.* W. E. Johnston *et al.*, owners of the Winter lode, by letter dated February 24, 1896 (Mineral Law Digest, Kennedy *vs.* Johnston, pp. 96, 135, 216, 227, 245, and 309).

The ground inclosed within the Winter lode had also been included within the lines of numerous former lode mining locations for thirteen or fourteen years prior to

the 30th of May, 1893, most of such locations being prior to 1880. The names of some of these claims were the Pocket Liner lode, the Robert Burns lode, the Glengary lode, the Pennsylvania lode, the Eclip lode, the Little Winnie lode, the Comstock lode, the Lowland Chief lode, the Highland Chief lode, the Carlton lode, the Badger Girl lode, and the Howland lode. It is undisputed that the ground embraced in the Eulalia Lode location had been, long previous to May 30, 1893, located and worked as mining ground, and so held by other parties, as well as the Winter and Pocket Liner owners.

It is further undisputed and incontestible that the owners of the Winter lode found in their discovery shaft located on tract B, adverse plat (plat, R., fol. 144), over 200 feet deep in 1879 and 1880, mineral in place, and that such mineral is in sight on the dump of the Winter shaft in March, 1905; that this discovery shaft of the Winter lode is less than 30 or 40 feet distant from the original discovery shaft of the Eulalia lode, as well as the Golden Rod shaft.

It is further undisputed and incontestible that the owners of the Pocket Liner lode found in their discovery shaft located on tract C, adverse plat (plat, R., fol. 144), in the years 1879 and 1880, mineral in place at a point from 90 feet to 127 feet down that shaft (see testimony of Charles Slavin, witness of defendant in error, R., pp. 171–177, fol. 277 to 286), and that such mineral and quartz is in sight on the dump of the Pocket Liner shaft in March, 1905. These facts were publicly known at the time the Eulalia lode was located, and especially to Samuel McMillen, one of the plaintiffs in error and a former owner in the Pocket Liner lode; in fact and in truth his money, work, and effort contributed to the actual discovery of the ore vein in the Pocket Liner shaft in the years 1879 and 1880.

The Golden Rod lode, claimed by defendant in error, The Ferrum Mining Company, was located January 25, A. D. 1894, by Robert B. Estey and Charles T. Limberg, grantors

of defendant in error, upon and within the same identical premises. Their location certificate was recorded January 29, 1894 (R., fol. 184, pp. 110, 111).

It is undisputed that the discovery shafts of the Eulalia lode and the Golden Rod lode were both located at a point from 400 feet to 425 feet west of the east end line of the claims and within a distance of three or four feet of one another, (evidence W. L. G. Smith, witness for defendant in error, R., fol. 190, p. 114; R., fol. 149, p. 89, location certificate Eulalia lode; also R., fol. 184, pp. 110, 111, location certificate Golden Rod lode).

In the Eulalia location certificate (R., fol. 149, p. 89), the following description locates the place of its discovery shaft:

"425 feet running S. 77° 30′ E. from center of discovery shaft, and 1075 feet running N. 77° 30′ W. from center of discovery shaft."

In the Golden Rod location certificate (R., fol. 184, p. 110), the following description locates the place of its discovery shaft:

"1100 feet running N. 77° 30′ W. from center of discovery shaft and 400 feet running S. 77° 30′ E. from center of discovery shaft."

Neither shaft was sunk to exceed a depth of twelve or fourteen feet, and neither the plaintiffs in error nor the defendant in error made claim and introduced evidence in the case that mineral in place had been discovered in either one of said discovery shafts, and the admitted fact was that neither shaft had passed through or below the wash and alluvial debris usually encountered upon Breece hill, in the Leadville mining district (evidence W. L. G. Smith, witness for defendant in error, R., fols. 189 and 190, p. 114).

The undisputed evidence was that the discovery notices for both the Eulalia lode, the claim of plaintiffs in error and the Golden Rod lode, the claim of defendant in error

were placed and posted at these two twelve-foot holes designated by them as their original discovery shafts, and that no other or different notices or discovery stakes were ever placed at any other point upon the surface of these two contested claims by either the plaintiffs or the defendant (R., fol. 187, p. 112, evidence W. L. G. Smith, for defendant; R., fol. 139 p. 83, evidence George Holland, for plaintiff).

It is further established that on the 14th day of December, 1894, the defendant in error, The Ferrum Mining Company, filed an additional and amended location certificate establishing their discovery shaft at practically the same point as the one filed January 29, 1894 (R., fol. 290, pp. 179–180).

That defendant in error in said additional and amended location certificate described the place of location of their discovery shaft to be December 14, 1894, as follows (R., fol. 290, p. 179):

"1100 feet running N. 77° 31′ W. from center of discovery shaft and 400 feet running S. 77° 30′ E. from center of discovery shaft, said discovery shaft being situate upon said lode, vein, ledge or deposit."

That afterwards and upon March 8, 1895, defendant in error filed a second additional and amended location certificate establishing, for the first time and without posting a notice of discovery or doing any additional discovery work, a new discovery shaft at a point nearly 800 feet west of their original discovery shaft, and at the very shaft used by Samuel McMillen as the discovery shaft of the Pocket Liner lode in 1879 and 1880 (R., fols. 293–294, pp. 181 and 182).

The description identifying this change of base as to their discovery shaft was as follows:

"363.45 feet running N. 71° 11′ W. from center of discovery shaft and 391.15 feet running S. 83° 51′ E. from center of discovery shaft and thence running S. 77° 45′ E. 450 feet and thence S. 66° 25′ E. 254.97 feet."

The purpose, as stated in the certificate, was as follows:

"For the purpose of correcting any errors in the original location, description or record and of taking in and acquiring all forfeited or abandoned overlapping ground and of taking in any part of any overlapping claim which has been abandoned or cancelled and of securing all the benefits of said section 2409 of the General Statutes of Colorado" (R., fol. 294, p. 182).

Plaintiffs in error title to the Eulalia lode was based upon the following positions:

First. That upon the 30th day of May, A. D. 1893, Samuel McMillen, one of the locators and owners of the Eulalia Lode mining claim and one of the plaintiffs in error, had prior to that date discovered, within the limits of his said location, the Eulalia lode, a vein and lode of mineral bearing gold and silver, and knew at the time of making his location upon the said 30th of May, A. D. 1893, and claimed by such staking, location work, and recording of a location certificate thereof, that there had been a discovery of a vein or lode within the limits of his location; that this vein and lode then existed and was disclosed in what has been termed in this suit the Pocket Liner shaft, a shaft sunk by Samuel McMillen and his co-owners of the Pocket Liner lode, in the years 1879 and 1880, to a depth of 125 or 130 feet; that at a point 75 or 80 feet from the surface a vein and lode of gold and silver bearing ore was disclosed and opened by the said Samuel McMillen and his co-owners, which was over a foot thick, with distinct walls in rock in place, having a course 61 degrees east and dipping 69 degrees to the west, passing out of said shaft at a point about 120 feet from the surface, and that the said Samuel McMillen sunk his said shaft in 1879 and 1880, below the point where said vein passed out of the western side of his shaft; that the said Pocket Liner shaft was situated some 750 or 800 feet west of the point on the surface of the Eulalia lode where

the discovery stake and notice of discovery were placed by the said Samuel McMillen and his co-locators of the Eulalia lode upon the 30th day of May, 1893, and that said Pocket Liner shaft and the vein disclosed and discovered therein was, were, and are within the lines and limits of the Eulalia lode, and that said discovery was claimed by the said McMillen as his discovery of the Eulalia lode; that the title of the Pocket Liner lode had lapsed and become forfeited for failure to do the annual labor by the owners thereof, and that on the 30th day of May, 1893, the territory contained within the lines and limits of the said Eulalia lode was unappropriated and vacant mineral land of the United States.

Second. That during the summer and fall of the year 1894 the plaintiffs in error, Ronald Morrison and Samuel McMillen, opened, disclosed, and discovered by drifts, upraises, and stopes from the 380-foot level of the Little Vinnie Lode mining claim, a lode claim adjoining the Eulalia Lode mining claim upon the east, a vein, lode, and ledge of gold and silver bearing ore within the limits of the Eulalia Lode mining claim, and shipped therefrom large quantities of valuable gold and silver bearing ores; that said mineral and ores were taken from a vein, lode, and ledge of mineral in rock in place within the limits of the Eulalia Lode mining claim and at a point over 10 feet below the surface of said claim, viz., being three hundred and eighty (380) feet from the surface of the earth, ore shipped from the said vein or lode containing five and four-tenths ounces (5.4 oz.) silver and one ounce (1 oz.) gold per ton, gross value twenty-two and six-hundredths dollars ($22.06) per ton. See smelter sheet, Plaintiffs' Exhibit 10 (R., fol. 101, p. 61); also Plaintiffs' Exhibit No. 1 (R., fol. 75, p. 46); see ore stopes and drifts in tract A, southeast fraction Eulalia lode, underground plat, Exhibit No. 24 (R., fol. 153, pp. 92–93), said discovery having been made by plaintiffs in error in the months of October, November, and December, 1894, while

defendants in error were still claiming their discovery in their original discovery shaft by their location certificates recorded respectively January 29, 1904, and December 14, 1904, and over four months before their claim of a discovery at a different point by location certificate March 8, 1895.

Third. That during the summer and fall of the year 1895, while in the performance of the annual labor upon the Eulalia Lode mining claim, these plaintiffs in error drove a drift in a northerly direction from the Pocket Liner shaft at a depth of 113 feet from the surface not less than 10 feet in length, and that said drift was driven upon a vein, lode, and ledge of mineral bearing gold and silver, having well-defined walls of rock in place; that this was and is the same vein discovered, opened, and disclosed by the said Samuel McMillen and his co-owners when the said Pocket Liner shaft was first sunk, and is the same vein known and claimed by him to have been discovered and existing upon the 30th day of May, 1893, the date he set the first stakes and discovery notice of the said Eulalia Lode mining claim.

Fourth. That during the year 1898 plaintiffs in error continued their drift in a northerly direction from the Pocket Liner shaft at a depth of 113 feet from the surface a distance of over 10 feet upon the same vein, lode, and ledge of mineral bearing gold and silver in rock in place.

Fifth. That during the year 1899 plaintiffs in error continued their drift in a northerly direction from the Pocket Liner shaft at a depth of 113 feet from the surface to a distance of 39 feet from the shaft upon the same vein, lode, and ledge of mineral bearing gold and silver.

It is hardly necessary to state that the trial court absolutely and positively refused to allow plaintiffs below to introduce any evidence whatever to the jury sustaining any one of the five positions claimed as the basis for their title.

Defendant in error's title to the Golden Rod lode was based upon the following statement:

First. That upon the 25th day of January, A. D. 1894,

Charles T. Limburg and Robert B. Estey entered upon the premises in dispute and sunk a discovery shaft to a depth of 10 or 11 feet within four feet of the discovery shaft of the Eulalia lode, calling their claim the Golden Rod lode, and placing their discovery notice at that point, recording their location certificate January 29, 1894; that upon the 30th day of January, 1894, the said Limburg and Estey leased to Messrs. Charles Slavin and Thomas Walsh, who had been in possession of the shaft known as the Pocket Liner shaft from January 22, 1894, the Golden Rod lode; that the lessees during the year 1894 sank the said Pocket Liner shaft 150 feet deeper, making it in all 280 feet deep, without finding any vein or mineral in its farther depth, and drove a drift in a southeasterly direction from the said Pocket Liner shaft at a depth of 130 feet from the surface, the drift being 45 feet in length, and claimed to have discovered no less than six veins, lodes, and ledges of mineral bearing gold and silver in rock in place in said drift, their positions and descriptions being as follows:

A. Designated as vein No. 1, four feet from the southeast edge of the shaft, running north 30 degrees east, dipping 70 degrees west, with both walls porphyry an inch to an inch and one-half wide, sample assaying .5 ounce silver and .02 ounce gold.

B. A vein six feet from the edge of the shaft, material assaying 7 ounces silver, .03 ounces gold.

C. A vein fifteen or sixteen feet from the shaft, running north, with both walls porphyry, from one-fourth ($\frac{1}{4}$) of an inch to one-half ($\frac{1}{2}$) of an inch thick.

D. Designated as vein No. 2, nineteen feet from the edge of the shaft, running northwest and southeast, dipping north 61 degrees east, both walls porphyry, an inch to an inch and one-half wide, sample assaying 0.5 ounces silver, 0.02 ounces gold.

E. Designated as vein No. 3, forty-one feet from the edge of the shaft, running in a northerly direction, dipping to the

west, both walls porphyry, an inch to an inch and one-half thick, sample assaying a trace of silver, 0.09 ounces gold.

F. Designated as vein No. 4, forty-five feet from the shaft, running north 10 degrees east, dipping 48 degrees west, both walls porphyry, one to three inches thick, samples assaying no silver, 0.13 ounces gold, and 0.4 ounces silver and 0.11 ounces gold.

All of these veins were disputed by the testimony of four witnesses of plaintiffs in error, including Charles Slavin, the lessee of the locators (R., fol. 284, p. 175), who drove the drift.

The blue-print photograph (R., fol. 222, p. 134) is a copy of the map presented by the leading expert witness for defendant in error, showing the positions of these veins as claimed.

In their cross-complaint defendant in error made no claim of title through the Pocket Liner shaft or a discovery therein, their sole allegation of title being as follows:

"That afterwards and prior to the twenty-fifth day of January, A. D. 1894, they sank a discovery shaft on said premises to a depth of more than ten (10) feet from the lowest part of the rim of said shaft at the surface and discovered therein a vein, lode, ledge or deposit of mineral in rock in place bearing silver and other metals" (R., fol. 20, p. 11).

Every offer of evidence on the part of defendant in error was granted and allowed, and the conclusion was, of course, a verdict for them.

The following is a specification of the errors relied upon (see R., fols. 404–421, pp. 245–256):

"ASSIGNMENT OF ERRORS.

"And now come the above named plaintiffs in error and for assignments of errors herein, say: That in the record and proceedings in said cause the supreme court of Colorado, and the district court of the fifth judicial district in and for the county of Lake and State of Colorado, committed manifest error to the injury of these plaintiffs in error in the following particulars in this, to-wit:

"First. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado; that the plaintiffs in error were not entitled under section 2320 of the Revised Statutes of the United States to prove the discovery of and existence of a lode and vein of gold and silver ore within the limits of their Eulalia Lode mining location, antecedent to and prior to their location of said ground, upon the 30th day of May, A. D. 1893, and the recording of their location certificate upon June 17th, 1893, whether made and discovered by themselves or other parties; and that they knew and claimed at the time of making their location, that there had been a discovery of a vein or lode within the limits of their location, and that the construction put upon that part of section 2320, of the Revised Statutes of the United States, which says:

> "'No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located'

by the supreme court of Colorado, was adverse to and in opposition to the rights of plaintiffs in error under the said statute of the United States, and in direct contravention of plaintiffs in erorr's express right, title, privilege and immunity, to prove the existence and discovery of a vein and lode at any point and place within the surveyed and claimed limits of their location;

"That such construction of the evidence offered by the plaintiffs in error in the trial court, and the sustaining of the said ruling by the supreme court of Colorado, was in direct opposition to and not in accordance with the following decisions of the United States courts and the appellate courts of the other mining States, upon the same offer of evidence:

"Book *v.* Justice Mining Co., 58 Fed. Rep., 106.
"Jupiter M. Co. *v.* Bodie Cons. M. Co., 11 Fed., 666.
"Nevada Sierra Oil Co. *v.* The Home Oil Co., 98 Fed. Rep., 673.
"Erwin *v.* Perego, 93 Fed. Rep., 611.
"Conway *v.* Hart, 129 Cal., 480; 62 Pac., 44.
"Hayes *v.* Lavagnino, 17 Utah, 185; 53 Pac. Rep., 1020.
"Werner *v.* McNulty, 7 Mont., 30; 14 Pac. Rep., 643.
"O'Donnell *v.* Glenn, 8 Mont., 284; 19 Pac. Rep., 302.

"Second. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in not allowing *Thomas H. Thompson*, witness for plaintiffs in error, and the former partner of Samuel McMillen, in the Pocket Liner Lode location, to answer the following question:

"'Q. Will you state what you found in that shaft in the year 1879?'

"That such ruling was adverse to and in contravention of plaintiffs in error's express rights, title, privilege, and immunity under section 2320 of the Revised Statutes of the United States, to prove the existence and discovery of a vein and lode of precious ores at any point and place within the surveyed and claimed limits of their location, and was at variance with the uniform rule and practice of the United States courts, and of the supreme courts of the mining States, in admitting evidence of this character.

"Third. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in not allowing Steven Connors, witness for plaintiffs in error, and former owner in the Pocket Liner Lode location, to answer the following question:

"'Q. Will you state, if you remember what were the contents, not the number of ounces—will you state whether that assay showed the presence of gold and silver within that rock that you gave to the assayer?'

"That such ruling was adverse to and in contravention of plaintiffs in error's express rights, title, privilege and immunity, under sec. 2320 of the Revised Statutes of the United States, to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location.

"Fourth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in not allowing George Holland, witness for plaintiffs in error, and a United States deputy mineral surveyor at the date of the survey of the Eulalia Lode mining claim, May 30th, 1893, to answer the following question:

"'Q. When you were at the Pocket Liner shaft was there anything said by one of the parties present, especially Mr. McMillen, one of your employers, as to the presence of mineral in that shaft?'

"That said ruling was adverse to and in contravention of

plaintiffs in error's express right, title, privilege and immunity, under sec. 2320 of the Revised Statutes of the United States to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location.

"Fifth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, as stated in folios 357, 358 and 359 abstract as follows:

"'Mr. ELDER: The proposition of the plaintiffs is simply this: That Mr. McMillen as an owner and a locator of the Eulalia lode knew, at the time he placed his stake upon the Eulalia claim on the 30th of May, 1893, that he, in company with the co-owners of the Pocket Liner claim, had discovered ore in the shaft of the Pocket Liner claim; that at the moment that he placed his stake upon that ground, claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States, and of the State of Colorado, and that that knowledge within the mind of Mr. McMillen constituted a complete, final and perfect location of that mining claim, provided he did the other things requisite under the statutes of the State of Colorado, by sinking a discovery shaft ten feet in depth, etc. etc. etc.

"'The COURT: I cannot agree with you. Our statute is clear as to what is required and it has become almost elementary. You must go either upon the vein and make your discovery, or you must go into the shaft in which the vein has already been discovered and do some work. The objection will be sustained.'

"That the prohibition of the trial court, excluding all testimony of the existence of a vein and lode at any other point within the limits of their Eulalia location at the date of location unless shown in their surveyed discovery shaft, and the court's construction of the statute of Colorado, act of February 13th, 1874, General Laws of Colorado 1883, section 2401, was in direct conflict with the requirements of section 2320 of the United States Statutes. That under such construction and ruling the statute of the State of Colorado, act of February 13th, 1874, is invalid, inconsistent with, repugnant to and in contravention of section 2320 of the United States Statutes, and that the decision of the supreme court of Colorado sustaining such ruling is a denial of, and against

the title, right, privilege and immunity claimed by plaintiffs in error under section 2320, United States Statutes, to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location.

"Sixth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, in refusing to give instruction No. two asked by plaintiffs in error, as follows:

"'The court further instructs the jury that although a discovery of mineral in rock in place is a necessary prerequisite to a valid location of a lode mining claim, yet such discovery does not necessarily have to be made in the location or discovery shaft. If a valid discovery of mineral in rock in place is made within the boundaries of the claim before any adverse rights have accrued this would make his location a valid and legal one.'

"Seventh. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in refusing to give instruction No. four asked by plaintiffs in error, as follows:

"'The court further instructs the jury that in a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show not only a location upon ground in due form of law, but also to show that the location was made upon a vein or lode of quartz, or other rock in place, bearing mineral, with the discovery or knowledge on the part of the locator before the location was made of the existence of mineral.

"'And under section 2320 Revised Statutes of the United States, the locator of a mining claim is not required to be the original discoverer of the vein or lode. If, at the time of making the location, there is the discovery of a vein or lode of quartz or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location even though the discovery was first made by some one other than the locator.'

"Eighth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in refusing to give instruction No. five asked by plaintiffs in error, as follows:

"'The court further instructs the jury that it is not necessary that the locator of a mining claim should be the first

discoverer of a vein or lode, in order to make a valid location.

"'It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location, but it must be known to him and claimed by him in order to give validity to the location.'

"Ninth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in refusing to give instruction No. 8 asked by plaintiffs in error as follows:

"The court instructs the jury that if you believe from the evidence in this case that prior to the 25th day of January, A. D. 1894, the plaintiffs or their grantors, were in the quiet and undisputed possession of the premises designated in the complaint as the 'Eulalia lode,' claimed by the defendant as the 'Golden Rod lode;' that upon May 30th, 1893, long prior to said 25th day of January, A. D. 1894, plaintiffs or their grantors posted on the surface a plain sign or notice containing the name, 'the Eulalia lode,' the name John Kennedy, the locator, and the 30th day of May, 1893, the date of location; that the plaintiffs or their grantors so marked the boundaries of said Eulalia Lode mining claim by the erection of six substantial stakes hewed or marked on the sides in toward the claim and sunk in the ground, one at each corner and one at the center of each side line so as to be readily traced, and that on or about June 17, 1893, and within ninety days of said 30th day of May, A. D. 1893, the said plaintiffs duly recorded a location certificate containing the name of the lode, the name of the locator, the date of location, the number of feet in length claimed on each side of the center of discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, and sank a discovery shaft thereon, to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface; *and that theretofore there had been discovered within said boundaries a vein or lode of quartz or other rock, in place, bearing gold, silver, or other precious metals, then this constitutes a prima facie* case for the plaintiffs which can only be overcome by the defendant by proof of subsequent abandonment or forfeiture, or other divestiture and the acquisition of a better right or title by the defendant and its grantors."

"Tenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado; that the plaintiffs in error were not entitled under section 2320 of the Revised Statutes of the United States, to prove that in September, October, November and December, 1894, appellants drove a drift from the workings of the Little Vinnie Lode mining claim at a point 380 feet from the surface of the earth, into the southeast fraction of their Eulalia claim, a distance of over 64 feet, and also constructed and opened certain upraises and stopes within the limits and boundaries of their Eulalia Lode claim as surveyed; and that in these workings and developments, within the limits of their Eulalia location, they discovered, disclosed and opened a large and valuable vein of gold and silver bearing ore in rock in place, and from this vein shipped large quantities of gold and silver bearing ore to the smelters.

"That such ruling and construction of the statutes of Colorado, upon the objection of the defendants, was in direct conflict with the requirements and provisions of section 2320 of the United States Statutes. That under such construction and ruling, the statute of the State of Colorado, act of February 13th, 1874, is invalid, inconsistent with, repugnant to and in contravention of section 2320 of the United States Statutes, and that the decision of the supreme court of Colorado sustaining such ruling is a denial of and against the title, right, privilege and immunity claimed by plaintiffs in error under section 2320 United States Statutes, to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location, and that such ruling was in violation of the rights of plaintiffs in error, not only under section 2320 of the United States Statutes, but also in contravention of their vested rights under section 7, page 127, of the General Laws of 1874, of the Territory of Colorado, which is section 2403, page 723, General Statutes of Colorado 1883, which reads as follows:

"'Any open cut, cross-cut or tunnel which shall cut a lode at a depth of 10 feet below the surface, shall hold the same as if a discovery shaft were sunk thereon, or an adit of at least 10 feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft.'

and that such ruling was adverse to the construction of section 2403, Laws of 1883, given and rendered by the supreme court of Colorado in

Hall *v.* Kearney, 18 Colo., 505;
Brewster *v.* Shoemaker, 28 Colo., 176.

"Eleventh. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in excluding the map and testimony of W. L. G. Smith, of the drift, stopes, and upraises, and the vein of gold and silver ore found therein, opened and constructed by plaintiffs in error from the 380-foot level of the Little Vinnie lode into their Eulalia lode—see folios 321–331 of abstract, as follows:

"'W. L. G. Smith, mining engineer, in October, November and December 1894, and January 1895. I was employed by Ronald Morrison about that time to survey along the lines of the Little Vinnie lode, what is known as the Eulalia lode, I have made a correct map of the underground workings of the Eulalia lode on the side line of the Little Vinnie lode.

"'Q. Have you such a map?

"'A. Yes.

"'Q. Is this the map, sir?

"'Mr. CAVENDER: I object to that. It appears from the testimony that is underground working from the Little Vinnie claim into the Eulalia claim. We object upon the ground that it is improper to make a showing in such workings, and there is no testimony of any working through the Little Vinnie claim that can be proved to show a discovery of mineral in this case; in other words, a discovery in one claim cannot be made through the workings of another; that you cannot make a secret discovery under the statutes of this State, especially with reference to relocations.

"'Mr. ELDER: Second. We offer that in case of the working of the Eulalia lode and shipping of ore, or the discovery of mineral in either the drift or the stopes above the drift during the period of the year 1894, that would be a sufficient discovery of mineral, in the failure of a discovery by other parties prior to that period of time and that such a discovery would inure to and relate back to the original location of this claim upon the ground.

"'The COURT: Well, it is a second string to your bow. If you should offer it to prove a discovery, you must in some way show that it was accessible from the ground claimed by you, and on which it was intended to constitute the discovery. In other words, you must have had an opening to the surface on that ground, which would have made or constituted visible notice to somebody intending to locate, that a discovery might exist at the bottom of that opening, which would put them on their guard and be notice to them which they would be compelled to accept and could not plead ignorance of.

"'Mr. ELDER: Does your honor hold that the United States statute requires any such thing?

"'The COURT: I hold most emphatically this, that you cannot have a secret or concealed discovery from an opening on another claim or on Government land.

"'Mr. ELDER: Does the court assume that this was a secret discovery of any kind?

"'The COURT: There was nothing as far as I see the evidence now; I may be mistaken. This particular part which you point out, which appears to be colored light blue, you have shown no opening from the Eulalia ground connecting with that drift. Perhaps I can explain the position to you in this way: Suppose I had been walking over the Eulalia claim with the idea of seeing what there was on the ground, believing it to be vacant, unoccupied domain; that drift might have existed there, and undoubtedly did exist 300 or 400 feet underground, and yet it would not give me the slightest notice. There must be something on the ground to give notice of a discovery, to constitute a discovery.

"'Mr. ELDER: Then your honor rules that our complete conformance to the location requirements of the United States Statutes and the statutes of Colorado with reference to staking and having a discovery shaft is not sufficient notice to the world of our claim of the property?

"'The COURT: What I hold, Mr. Elder, at this time is, that you cannot introduce evidence of that drift, for the purpose of establishing a discovery on the Eulalia ground, unless you show an opening or visible connection with the surface of the Eulalia ground, which would have constitnted notice to any one intending to locate the same.

"'Mr. ELDER: Now, as to the second offer, the court at the present time rules that we cannot introduce that map for the

purpose of showing a discovery from the underground workings of the Little Vinnie claim?

"'The COURT: Unless you can show an opening to the surface of the Eulalia claim.

"'To which ruling of the court, plaintiffs by their counsel then and there duly excepted.'

"'That such ruling and construction of the statute of Colorado, upon the objection of defendants, was in direct conflict with the requirements and provisions of section 2320 of the United States Statutes.

"That under such construction and ruling the statute of the State of Colorado, act of February 13th, 1874 is invalid, inconsistent with, repugnant to and in contravention of section 2320 of the United States Statutes, and that the decision of the supreme court of Colorado sustaining such ruling is a denial of and against the title, right, privilege and immunity claimed by plaintiffs in error, under section 2320 United States Statutes, to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location, and that such ruling was in violation of the rights of plaintiffs in error, not only under section 2320 of the United States Statutes but also in contravention of their vested rights under section 7, page 127 of the General Laws of 1874 of the Territory of Colorado, which is section 2403, page 733, General Statutes of Colorado 1883, which reads as follows:

"'Any open cut, cross-cut, or tunnel which shall cut a lode at the depth of 10 feet below the surface, shall hold such lode the same as if a discovery shaft were sunk thereon, or an adit of at least 10 feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft.'

"And that such ruling was adverse to the construction of section 2403, Laws of 1883, given and rendered by the supreme court of Colorado in:

"Hall *v.* Kearney, 18 Colo. 505;

"Brewster *v.* Shoemaker, 28 Colo., 176.

"Twelfth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in excluding the testimony of M. N. McInnis, miner, of the drift, stopes, and upraises made and constructed by plaintiffs in error, and the vein of gold and silver ore found

therein, discovered and disclosed by appellants from the 380-foot level of the Little Vinnie lode into their Eulalia lode,—see folios 335, 336, 337, of abstract, as follows:

"'M. N. McInnis, miner: Have mined upon Breece hill,—mined on the Little Vinnie in December, 1894,—am familiar with the underground workings of the Little Vinnie, yes sir, part of it; am familiar with what is known as the 380-foot level of the Little Vinnie.

"'Q. Do you know of any work having been done from that level towards the Eulalia Lode claim in the fall?

"'A. We have an upraaise; we have a stope there in that level.

"'Q. Did you see any ore on the line of the Eulalia lode—common line of the Little Vinnie and the Eulalia lode?

"'Objected to by defendant.

"'The COURT: What is the purpose of it?

"'Mr. ELDER: We are going to prove we shipped ore from that ground.

"'The COURT: They will perhaps admit that you did.

"'Mr. EWING: No, we will not admit that; but this comes under the same objection. And the court sustained such objection. The court has already decided that such a drift does not constitute a discovery.

"'To which ruling of the court plaintiffs, by their counsel, duly excepted.'

"That such ruling and construction of the statutes of Colorado, upon the objection of defendants, was in direct conflict with the requirements and provisions of section 2320 of the United States Statutes.

"That under such construction and ruling the statute of the State of Colorado, act of February 13th, 1874, is invalid, inconsistent with, repugnant to and in contravention of section 2320 of the United States Statutes, and that the decision of the supreme court of Colorado sustaining such ruling is a denial of and against the title, right, privilege and immunity claimed by plaintiffs in error, under section 2320, United States Statutes, to prove the existence and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location, and that such ruling was in violation and contravention of their vested rights under section 7, page 127, of the General Laws of 1874

of the Territory of Colorado, which is section 2403, page 733, General Statutes of Colorado, 1883.

"Thirteenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county, Colorado, in excluding the testimony of W. L. G. Smith and M. N. McInnis, as stated in assignment of error No. 5, as follows (see folio 727):

"'5. The court erred in holding that the United States statutes and the statutes of Colorado required plaintiffs to show an opening or openings within the lines of their Eulalia claim from any vein, lode or ledge discovered by them within the limits of their Eulalia claim to the surface of the earth, before the plaintiffs could claim and prove a discovery of such vein, lode or ledge from, by or through workings having their only openings on territory outside the limits of their Eulalia claim.'

"That such ruling and decision of the supreme court of Colorado is a denial of and against the title, right, privilege and immunity claimed by plaintiffs in error under section 2320 United States Statutes, to prove the existence, and discovery of a vein and lode of gold and silver ores at any point and place within the surveyed and claimed limits of their location.

"Fourteenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in refusing to give instruction No. nine asked by plaintiffs in error, as follows:

"'The court instructs the jury that if they believe from the evidence that no lode, ledge or vein of quartz or other rock in place, bearing gold, silver or other precious metals had been disclosed and discovered in the discovery shaft of the Eulalia lode, or in the shaft known as the Pocket Liner shaft, prior to the location of the Eulalia lode upon the 30th day of May, 1893, either by the plaintiffs herein, their grantors, or some of them, or by third parties, with the knowledge of such discovery by plaintiffs herein, their grantors, or some of them, and if they believe further from the evidence that no lode, ledge, or vein of quartz or other rock in place, bearing gold, silver, or other precious metals, had been disclosed and discovered in the Golden Rod discovery shaft, or in the shaft known as the Pocket Liner shaft by the defendants or its grantors. And if the jury believe from the evidence that the plaintiffs herein, their

grantors or some of them, discovered a vein, lode or ledge of quartz or other rock, in place, bearing gold, silver or other precious metals, at a depth greater than ten feet below the surface of the earth in the part or portion of said premises as designated by them as the southeast Eulalia fraction, prior to any other discovery by defendant or its grantors, you are instructed that such discovery by plaintiffs relates back to the time of the original survey and location of the said Eulalia lode, and enables the plaintiffs and their grantors to hold the claim against all who had not acquired interests in the lode and premises at the time the acts were performed, and your verdict will then be for the plaintiffs.'

"Fifteenth. That the supreme court of Colorado erred in refusing to consider and pass upon assignments of error Nos. 2, 3, 4, 8, 10, 11, 12, and 13 of plaintiffs in error.

"Sixteenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in excluding every offer of evidence made by plaintiffs in error, in support of their title and in refusing to give every instruction asked by plaintiffs in error; and in admitting every offer of evidence made by defendants in error in support of their title, and in giving each and every instruction to the jury asked by defendants in error.

"Seventeenth. That the supreme court of Colorado erred in assuming that plaintiffs in error did not upon May 30th, 1893, claim all the veins and lodes in the ground included within the boundaries and limits of their Eulalia Lode mining claim, and claimed each and every vein in those limits, whether the one some of their number opened and discovered in 1879 and 1880 in the Pocket Liner shaft, the ore and crevice material shown on the dump of the Winter discovery shaft, less than forty feet from their Eulalia discovery shaft, or the vein and deposit from which tons upon tons of pay ore were shipped from their opening into the southeast Eulalia fraction from the 380-foot level of the Little Vinnie lode from between the porphyry and quartz contact found at that point, and the admitted fact of their prior location of eight months and their prior record of their location certificate, and their prior possession and occupation of the ground, forever disproves this assumption of the court.

"That the refusal of the court to allow this evidence to go to the jury was in contravention of the title, right, privi-

lege and immunity claimed by plaintiffs in error under section 2320 United States Statutes.

"Eighteenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in establishing the mineral land title in the junior locator of two mining locations where, as appears by the evidence, both discovery shafts were sunk in the wash and were but four feet apart, and neither of them were sunk over a depth of twelve feet, and in permitting the junior locator to introduce evidence of a vein or lode in some other part and portion of the ground, and in refusing such privilege to the senior locator.

"Nineteenth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in allowing defendants in error to prove the presence or discovery of a vein or lode at another point in their location than the one at which they posted their discovery notice, and where they claimed their original discovery shaft, and in refusing the same privilege and opportunity to plaintiffs in error.

"Twentieth. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in permitting evidence of the third amended location certificate, dated March 8th, 1895, of defendants in error, changing their discovery shaft from a point three hundred and seventy-five (375) feet from their east end line to a point over one thousand (1,000) feet west of their first discovery, and no proof being submitted of their placing of a new discovery notice at this new discovery shaft, the same being filed long after the discovery, opening up and shipping by plaintiffs in error of pay ore from their opening along the side line of the Little Vinnie lode at its 380-foot level, and while defendants in error were still claiming by their second amended location certificate, filed Dec. 12th, 1894, their original discovery shaft as their point of discovery. There is no provision of the statutes of the United States or of the statutes of Colorado by which an invalid discovery of mineral can be cured by the record of an amended or additional location certificate.

"Twenty-first. The supreme court of Colorado erred in confusing the facts of this case in its second opinion, upon the denial of plaintiffs in error's motion for rehearing, in

assuming that defendants in error made any claim whatever as the basis of their title to the only vein in the Pocket Liner shaft, discovered by Samuel McMillen and his associates in that shaft in 1879 and 1880, at the depth of from 90 to 114 feet, but their evidence and claim of title was based only and solely upon what they claimed to be six separate and distinct veins in their east drift, forty-five feet long, at a depth of 135 feet in the same shaft, and which their own witness and lessee, Thomas Slavin, testified were not veins at all, and only cracks and selvedges in the porphyry.

"Twenty-two. The supreme court of Colorado erred in sustaining the judgment of the district court of Lake county, while admitting errors of law in the admission and exclusion of evidence in both of their opinions, because the same were against the law and the facts.

"Twenty-three. That the supreme court of Colorado erred in sustaining the instruction No. six, given to the jury as asked by defendants in error against the exceptions of the plaintiffs in error, as follows:

"'The court further instructs the jury that under the pleadings and evidence in this cause, the plaintiffs cannot recover, and the sole issue presented to the jury is as to whether the defendant or its grantors have made a valid discovery and location upon the Golden Rod claim and performed the necessary work thereon.'

"Twenty-four. That the supreme court of Colorado erred in sustaining the ruling of the district court of Lake county in refusing to send the jury to the ground to inspect the premises as requested by plaintiffs in error.

"Twenty-fifth. That the supreme court of Colorado erred in not reversing the judgment herein, instead of affirming the same.

"Wherefore, the said plaintiffs in error pray that the judgment aforesaid may be reversed, annulled and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the judgment of said supreme court of the State of Colorado.

"GEORGE R. ELDER,
"*Attorney for Plaintiffs in Error.*"

Section 2320, Revised Statutes of the United States, reads as follows:

"Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons may equal, but shall not exceed one thousand five hundred feet in length along the vein or lode; *but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.*" (Sec. 2, Acts of Congress, May 10, 1872.)

The following are the two sections of the mining-location statutes of Colorado whose construction by the supreme court of Colorado was adverse to and in opposition to the rights of plaintiffs in error under section 2320 of the Revised Statutes of the United States and in direct contravention of plaintiffs in error's express right, title, privilege, and immunity to prove the existence and discovery of a vein and lode at any point and place within the surveyed and claimed limits of their location.

Mills' Annotated Statutes, section 3152:

"Before filing such location certificate the discoverer shall locate his claim by:

"First. Sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice.

"Second. By posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery.

"Third. By marking the surface boundaries of the claim" (Feb. 13, 1874).

Mills' Annotated Statutes, section 3154:

"Any open cut, cross-cut or tunnel which shall cut a lode at the depth of ten feet below the surface, shall hold such

lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft" (Feb. 13, 1874).

ARGUMENT.

First. Plaintiffs in error were entitled under section 2320 of the Revised Statutes of the United States to introduce evidence that at and prior to the location of their Eulalia lode, upon May 30, 1893, there had been a discovery theretofore made of a vein or lode of quartz or other rock in place bearing gold and silver, whether made by themselves, some of them, or other parties, and that they knew and claimed at the time of making their location that there had been a discovery of a vein or lode within the limits of their location, and that in making this proof they were not confined to the discovery shaft so called in their location certificate, but were entitled under said section 2320 to prove the existence and discovery of such vein and lode at any point within the surveyed limits of their location, and that the ruling of the trial court and the supreme court of Colorado sustaining such ruling that section 3152, Mills' Annotated Statutes of Colorado, absolutely inhibited plaintiffs in error from making such proof and put a construction upon that part of section 2320 of the Revised Statutes of the United States which says:

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

which was adverse to and in opposition to the rights of plaintiffs in error under said statute and in direct contravention of plaintiffs in error's express right, title, privilege, and immunity under said statute to prove the existence of a vein and lode and their knowledge of a prior discovery

thereof at any point and place within the surveyed and claimed limits of their location, and that such construction, in so far as it was based upon section 3152, Mills' Annotated Statutes of Colorado, rendered the same nugatory, invalid, and objectionable to section 2320 of the United States Revised Statutes.

The foregoing general statement contains the substance of the first nine assignments of error (R., fols. 404–410, pp. 245–249).

Plaintiffs in error entered upon the ground in dispute May 30, 1893. The attempted entry of the grantors of defendant in error was made January 25, 1894.

The cardinal principle which governs the conflicting claims of appropriators of mining claims and other rights on the public domain is that, other things being equal, the prior locator prevails, "*qui prior est tempore potior est jure.*" Therefore, as the location of the plaintiffs in error was prior to that of the defendant, it must prevail, unless the location itself was fatally defective or all rights under it were lost on account of subsequent occurrences.

One of the most comprehensive decisions ever rendered upon mining law is the first leading decision we will cite upon the question of how far the previous discovery of a vein, and the knowledge of the locator of the existence of a lode and vein within the limits of his location previously discovered or disclosed by himself or by some one else and abandoned and unoccupied at the time of his location, constitutes a valid location and compliance with the mining statutes of the United States in the case of

Book *et al. vs.* Justice Mining Company, 58 Fed., 106.

This suit was an action in equity brought by the owners of the "Peerless" mining location, made by them September 22, 1892, to quiet their title against the Justice Mining Company, which claimed title to the ground under and by virtue of the mining locations known as the "West Justice" and "James G. Blaine" lodes, located the 2d day of January,

1888. These locations were upon Gold Hill, Storey county, Nevada, and the ground within the limits of the claims had been located and claimed over and over again by miners and prospectors, being known as valuable mining ground for twenty years prior to the location by the Justice Company, and being upon and in close proximity to the great Comstock ledge.

Section twenty (20) of the syllabus of the opinion prepared by the court is as follows (page 109):

"It is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode, in order to make a valid location. It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location."

On page 128 the court states:

"It is an undisputed fact that the locators of the West Justice and Blaine locations were not the original discoverers of the vein or lode, but it is not necessary that the locators should be the first discoverers of a lode in order to make a valid location. It is sufficient if it is shown that the locators knew at the time of making their locations that there had been a discovery of a vein or lode within the limits of the locations made by them."

Citing Jupiter M. Co. *v.* Bodie Cons. M. Co., 11 Fed. Rep., 666.

We desire to call the court's attention to the close analogy of the facts of the location of the Eulalia lode with those of the facts of the West Justice and James G. Blaine locations, and for that purpose we quote the review of the testimony by Judge Hawley upon pages 121 and 122:

"Upon the part of the defendant, Lyons testified that the northwestern part of the West Justice ground had been worked by miners in 1878 and 1879; that he knew that gold and silver bearing rock and earth had been taken out of the cuts that had been made by the miners who at that time were working upon and claimed the same as mining

ground; that prior to making the West Justice location he knew that there was a lode within the boundaries of that location containing gold and silver bearing rock and ore. He described the places where the old workings were, and the open cuts which still exist upon the surface of the ground. He further testified that in 1882, when he was foreman of the Justice mine, he let a contract to four men, and that they took out from the open cuts about $800 in gold and silver ore. Other witnesses corroborate his testimony. Harrington testified that before making the Blaine location he was all over the ground and examined it closely; that he discovered and found quartz rock in place bearing mineral within the limits of the Blaine location; that he found holes that had been sunk seven or eight feet long and six feet deep, and three or four feet in width in the ground, in which was quartz rock in place; that there were several holes sunk down below the surface in solid rock, in which streaks of quartz and porphyry were found; and that he saw in some of these holes streaks of quartz a foot wide. Other witnesses corroborated this testimony."

The latitude allowed by Judge Hawley in permitting evidence of what occurred upon the ground in 1878 and 1879, over ten years before the location of the West Justice and James G. Blaine lodes, and again in permitting testimony as to the open cuts and trenches and the $800 in gold and silver taken from them in 1882, over six years prior to the location of the West Justice and James G. Blaine locations, all these acts and all of this work being performed by strangers to the later title, is in striking contrast to the narrow and inconsiderate ruling of the trial court in this case in refusing and excluding evidence and testimony going to show that Samuel McMillen, one of the plaintiffs in error, had, in 1879 and 1880, while working with his copartners in the Pocket Liner lode, sinking that shaft, opened, discovered, and disclosed a vein of mineral bearing gold and silver some eighty or ninety feet from the surface, and sunk his shaft therein to a depth of twenty-five or thirty feet further. This ruling of the trial court as against plaintiffs' rights was all

the more unreasonable in that he allowed Charles Slavin, one of the witnesses of the defendant, to testify as to that vein in his direct examination (R., fol. 282, p. 174), although the defendants below nowhere and at no time in this case base their title upon this vein.

Judge Hawley, in applying this principle to the Book state of facts, only followed in the footsteps of a greater and more distinguished judge, his predecessor in the same district of Nevada upon the United States bench, judge Sawyer, who announced the same doctrine in the case of Jupiter M. Co. *vs.* Bodie Cons. M. Co., 11 Fed. Rep., 666, saying, p. 676:

"It is not necessary that the locator should be the first discoverer of the vein, but it must be known and claimed by him in order to give validity to his location."

Again, Judge Ross, of the United States circuit bench, in the case of Nevada Sierra Oil Co. *vs.* Home Oil Co., 98 Fed., 673, states, page 679, the identical principle we contend for:

"It is also true, as a matter of law, that it is not necessary that a locator should be the first discoverer of mineral upon the land in order to make a valid location; but he must not only have knowledge of the former discovery, but such actual discovery must be adopted and claimed by him in order to give validity to his location."

On page 676 of the same opinion he expresses the true view of the liberality courts should extend to locators of mining claims:

"It is entirely true that the statute, requiring as a condition to a valid location the discovery of mineral within the limits of the claim, should as between conflicting claimants to mineral lands, *receive a broad and liberal construction*, and so as to protect *bona fide* locators who have really made a discovery of mineral, whether it be under the statute providing for the location of vein or lode claims or placer claims."

We claim for plaintiffs in error that the discovery made by one of them, Samuel McMillen, in the Pocket Liner shaft, while the same was being sunk in the years 1879 and 1880, formed a complete compliance and performance of one of the two prerequisites prescribed by the acts of Congress to vest in him the complete possessory title to his Eulalia Lode mining claim, and that his entry upon the 30th of May, 1893, and distinctly marking the said claim by staking monuments and surveying the lines on the ground and recording June 17, 1893, a location certificate accurately describing said claim by metes and bounds and permanent monuments, and sinking a discovery shaft over a depth of ten feet, completed the other prerequisite to vest the title in himself and his colocators.

In the case of Erwin *vs.* Perego, 93 Fed., 611, Justice Sanborn, of the circuit court of appeals, most clearly states what are these preliminary and necessary incidents to the acquiring mining titles to lode claims:

"The acts of Congress prescribe two, and only two, prerequisites to the vesting in a competent locator of the complete possessory title to a lode mining claim. They are the discovery upon unappropriated public land of the United States within the limits of his claim of a mineral-bearing lode, and the distinct marking of the boundaries of his claim so that they can be readily traced. No appropriation of the land is made until both these requirements are fulfilled, and until that time the lode and land sought are open to location and appropriation by any competent locator; but when these requirements have been complied with the land is no longer public, but the possession and the right to the possession and the right to acquire the title are irrevocably vested in the locator."

Citing—

U. S. Rev. Sts., 2319, 2320, 2324.
1 Lindley Mines, 273, 328, 350.
Book *vs.* Min. Co., 58 Fed., 108.
Jup. M. Co. *vs.* Bodie Cons. M. Co., 11 Fed., 666.
Zollars *vs.* Evans, 5 Fed., 172.
McGinnis *vs.* Egbert, 8 Colo., 41.

Further, same page 611:

"There is no reason to be deduced from the acts of Congress or from the nature of the case why a claim upon which the location was made before the discovery should be held void, while one upon which the discovery was made before the location should be held valid, and the rights of these locators should be left where the Congress established them, valid and vested when both acts have been done, regardless of their order, but void and ineffectual when the rights of others have intervened before either act has been completed. The order in which the statutory requirements for securing a lode mining claim are complied with is immaterial, so long as the rights of others do not intervene before they are complied with. The marking of the boundaries of the claim may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will enure to the benefit of the locator as of the date of the later, and a complete possessory title to the premises will vest in him as of a later date."

And on page 612 the court says:

"It is not necessary that a locator shall make the first discovery of a vein or lode within his claim, all that the statutes require is that he shall discover the lode within his claim."

In the Perego case it seems, like Mr. McMillen, he made a discovery of a lode inside the limits of another claim upon September 5, 1888, and Perego lost title to his point of discovery by the patenting of the "Gopher" claim, a prior location. So did Mr. McMillen and his successors, owners of the Pocket Liner lode, by the approved survey of the Winter lode, U. S. survey 427, and their failure to adverse, lose the title gained by the discovery of the lode and vein found eighty feet down the Pocket Liner shaft in 1879 and 1880. Perego went outside of the Gopher claim lines, and in 1889 located his Star lode again. When the Eulalia lode was located by John Kennedy for the use of the plaintiffs in error in this case on May 30, 1893, both the Winter lode and the

Pocket Liner lode had been forfeited for failure to do and perform the annual labor for over twelve or thirteen years, and, as a matter of fact, the Land Department only cancelled the application for patent of the Winter lode after the protest and hearing had of John Kennedy, owner of the Eulalia lode, *vs.* W. E. Johnston *et al.*, owners of the Winter lode, by letter of the honorable Commissioner of the General Land Office, dated February 24, 1896 (Clark's Mineral Law Digest, Kennedy *vs.* Johnston, pp. 96, 135, 216, 227, 245, and 309).

In all these cases the courts without hesitation permitted contestants to enter into the history of the ground and into actual discoveries and appearances of discoveries on the ground, and the knowledge of the first claimants as to the occurrence and presence of mineral in place prior to their entries, and into the different locations made upon the ground, and in all the cases in the books we fail to find a single one that prohibits a locator from adopting and claiming a vein or lode as his discovery, whether the same was opened and disclosed by himself or others, only insisting that it was then unclaimed and unappropriated, and that the new locator knew of its discovery and thereafter adopted the discovery by proper survey and record.

Taking these decisions of Judges Sawyer, Hawley, Ross, and Sanborn, as the definite statement of this principle of the mining law, we are safe in claiming that the United States decisions are a unit upon this proposition. Up to the filing of this Eulalia case in the Supreme Court of the United States we are not aware that the Supreme Court of the United States has ever passed upon this question or has ever reversed, qualified, or limited these decisions of the Federal courts, as contained in

Book *vs.* Mining Co., 58 Fed., 108.
Jupiter M. Co. *vs.* Bodie Cons. M. Co., 11 Fed., 666.
Nevada Sierra Oil Co. *vs.* Home Oil Co., 98 Fed., 673.
Erwin *vs.* Perego, 93 Fed., 611.

But the United States bench is not alone in announcing and upholding this theory and principle of the law.

CALIFORNIA.

Conway *vs.* Hart, 129 Cal., 480, section 2, syllabus is:

"Evidence that, prior to the location of the claim in question, plaintiffs had sunk a shaft 25 or 30 feet and had taken from it a considerable amount of quartz rock, which formed a dump, and that rich rock was found, and that in surveying the claim the surveyor measured along the lode line taking his directions for the course of the vein from a line drawn from the shaft through two or three prospect holes where the ledge was exposed, together with the admission of the contesting claimant that the rock taken out was gold-bearing is sufficient to show that a gold-bearing lode or vein had been discovered by plaintiffs within their claim at the time the location was made."

Opinion, page 45, Judge McFarland states the facts more at large:

"2. We think that there was sufficient evidence to warrant the court in finding that the plaintiffs had discovered a lode before their location in 1894, although the plaintiffs, who seemed to have taken this fact for granted, could evidently have put the matter beyond a doubt by simply asking any one of their witnesses a direct question upon that subject. They, as before stated, had located this claim several years prior to 1894 and had done a good deal of work on it. They had sunk a shaft twenty-five or thirty feet deep, and had taken from it a considerable amount of quartz rock, which formed a dump. The witness Heiser, who had worked for plaintiff, testified that some years before the last location he found rich rock on the south end of the claim and informed one of the respondents of this fact, and warned him that the claim was jumpable, and that he afterwards got rock both from the shaft and the dump to show an expert. The witness Morse, when testifying about measuring the claim said: 'I measured along the lode line about the middle of May. I measured from the center of the shaft in Bear creek 1,200 along the

course of the vein so far as I could judge its course. As the ground is all capped, there is no rock in place at the surface. I took my directions for the course of the vein from a line drawn from the shaft through two or three prospect holes on the northern end of the claim, where the ledge is exposed.'"

And although this was after the location of 1894, still it has a bearing on the question, for the testimony is fairly susceptible of the meaning that the vein was exposed in the shaft which plaintiffs had sunk several years before their second location. The plaintiff Conway testified—indirectly, to be sure—to his knowledge of the vein at the time of the location, as appears from the following question and answer:

"Q. What direction does the vein run upon which you posted this notice? A. North and south."

The defendant himself, when on the witness stand, testified as follows:

"Some work had been done south of the shaft in Bear creek in the direction of my tunnel, that I know of in 1885 and 1886. It was done almost on my line in the direction of my shaft from the tunnel—between—on the vein. I was there when the work was in progress in 1886. At that time Mr. Conway and Mr. Heiser were working there. That work was inside the boundaries of my claim, probably 300 feet south of my north line. The rock was gold bearing."

"Now, there is no doubt whatever that there actually is, and of course at the date of the location was, a gold-bearing lode there. The appellant so avers in his answer, and proves by his testimony, and, considering all the evidence, we cannot say that the court was not warranted in holding that the rock taken by respondents and placed on the dump was not mere float rock, but rock taken from the lode which all admit to be there, *and that, consequently, respondents knew of the existence of the lode when their location in 1894 was made.* The evidence on the point was, of course, not very direct and explicit but it was sufficient to sustain the finding."

While the facts of this California case are clearly similar and almost identical with the facts of the Eulalia location, the evidence was mainly inferential, whereas in the Eulalia case the vein is testified to by several witnesses.

There are three points of resemblance in these cases:

First. Is the former location of the same ground by the same parties or some of them?

Second. That in each case the work of discovery—that is, sinking a shaft to the lode or vein—was done years before the location in the California case to a depth of twenty-five or thirty feet and in the Eulalia case at bar to a depth of 125 or 130 feet.

The third point of resemblance is that the undisputed fact is present in both cases of the existence of a gold and silver lode and vein in each claim at the date of location and knowledge of the existence of the lode in the minds of the locators, for in each case they were owners in the first location and were personally present when the lodes and veins were opened and discovered.

Just as in the case of Book *vs.* Justice Co., in 58th Federal, the California trial judge permitted evidence to go to the jury of work upon the ground and the discovery of vein material in the years 1885 and 1886, and also several years prior to the location in 1894, without introducing error into the case or considering, as does Judge Owers, the trial judge in the case at bar, that it was immaterial what Samuel McMillen or his partner, Thomas H. Thompson, found in their 125-foot shaft when they owned the ground as the Pocket Liner lode claim, and that the proof of a vein in the claim found by Samuel McMillen, Thompson, and his partners prior to the 30th of May, 1893, did not tend to establish any issue in the case, and that it was clearly inadmissible under the Colorado mining statute (R., fols. 169–170, pp. 101, 102).

And the supreme court of California had no difficulty in

sustaining the prior locator's title, and once again sustaining the cardinal principle which governs the conflicting claims of appropriators of mining claims and other rights on the public domain that, other things being equal, the prior locator prevails. "*Qui prior est tempore potior est jure.*"

UTAH.

The supreme court of Utah, in Hayes *vs.* Lavagnino, 17 Utah, 185; 53 Pac. Rep., 1029, stated the rule in even more unequivocal terms, as stated in paragraphs 2 and 3 of the syllabus:

"2. In a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show, not only a location upon ground in due form of law, but also to show that the location was made upon a vein or lode of quartz or other rock in place bearing mineral, with the discovery, or knowledge on the part of the locator, before the location was made, of the existence of mineral there.

"3. Under section 2320 Rev. St. U. S. the locator of a mining claim is not required to be the original discoverer of the vein or lode. If at the time of making the location there is the discovery of a vein or lode of quartz or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location, even though the discovery was first made by some one other than the locator."

Again, the evidence is wonderfully like the evidence excluded by the court below in the case at bar, and it is significant that the appellate court reversed the case exactly for the reasons that should reverse this case, extending the rule to a discovery of mineral made by others prior to the location and by strangers to the record.

We quote from evidence, p. 1031, Pac., 53:

"It appears the ground constituting the Gladstone claim was first located in 1878 and work done in sinking the discovery shaft. Thereafter it was several times relocated under different names, until in January 1882 when it was

located as the Gladstone claim. The parcel of ground thus located extends in a northeasterly and southwesterly direction, being bounded on the northeast by the Revere claim and on the southwest by the Montreal.

"This fraction of ground now called the 'Gladstone,' was first located in 1878. The shaft now used by the appellants for a discovery shaft was then used as a discovery shaft by the then locators."

"It is thus conceded that the discovery shaft was sunk before 1882, and, therefore, whatever mineral strata or vein may be shown to exist there must have been discovered before the location of the Gladstone, and it is but just and reasonable, under the circumstances of this case, to infer that, if a mineralized vein or lode was discovered by the sinking of that shaft, its existence was known to the locators of the Gladstone before the location was made. If a vein or lode actually exists at the point of their discovery, then such discovery would seem to be a substantial compliance with the provisions of section 2320, Revised Statutes of the United States, which reads:"

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

"This clause of the statute does not require that the locator of the claim must be the original discoverer of the vein or lode. If, then, in this case there was a discovery of a vein, *and knowledge on the part of the locators of metal there*, the locators were entitled to make their location, even though the original discovery was made by some one other than the locators (Jupiter Min. Co. *vs.* Bodie Cons. M. Co., 11 Fed., 666; Erhardt *vs.* Boaro, 113 U. S., 527). Does, then, the evidence show the existence of a vein or lode within the meaning of the statute? On this point the witness Gibbons, who has known that ground since 1880, testified:

"'I know what was shown me as the discovery of the Gladstone. I examined with a view of determining whether or not there is a cropping of the vein there. There are indications of a vein there. There is a shaft down there and some water in the bottom of it. The surface indications on the other side of the shaft are mineralized.

"'Q. Were they such indications that a miner would follow in that district, expecting to find a vein? A. Yes sir.

"'Q. Did you ever see any ore taken from there or any rock taken from the surface? A. Yes, sir.

"'Q. Is that the character of the rock, or the outcropping on the surface where this discovery was shown to be made? A. Yes, sir.

"'Q. Would that indicate a mineral vein in that locality? A. Yes sir, it would to me.'"

MONTANA.

Again, in Werner *vs.* McNulty, reported in 14 Pac., 643, the supreme court sustained an instruction covering this identical proposition of law. The instruction was as follows:

"It is not necessary that the work by which the vein or lead was discovered and made visible should be made by the locators. *It is sufficient if, at the time of location, the vein or lead is exposed to view, and its existence known by the locator for these facts would be equivalent to a discovery.*

Both the lower court and the supreme court in the above case found no difficulty in sustaining the same rule of law, "*Qui prior est tempore potior est jure.*"

The references we have made are surely sufficient to sustain the proposition that knowledge of the existence of a vein within the limits of his location, prior to such location, is a sufficient discovery and disclosure of a vein or lode under the statutes of the United States and the State of Colorado.

It is a remarkable coincidence that long prior to these decisions we have cited Judge Helm, in the case of Armstrong *vs.* Lower, 6 Colo., 395, made the following analogous exposition of the same principle:

"The essential prerequisite to the various acts constituting a valid mining location is the discovery of a vein, lode or ledge of mineral-bearing rock in place. But, if the relocator finds such vein in the discovery shaft of the abandoned claim, he may, under our statute, make a valid relocation thereon, though such finding is not a disclosure of some-

thing that 'existed before but remained unknown,' and therefore, technically perhaps, does not constitute a discovery."

Not a single authority can be found within the reports to contradict, dispute, modify, or even limit the force of the decisions we have referred to above.

The first and primary inquiry in contests over the possession and right of possession of lode mining claims is a very simple one:

Which one of the contesting claimants was the first in point of time to discover and to know of the existence of a vein or lode of mineral within the limits of the disputed ground?

Certainly, when the inquiry is, as it should be, confined to this narrow limit, these steps become and are very simple. All the obstacles and all the intricacies thrown or intruded into the administration and examination of concrete cases arising in the courts of the great precious mining territory of the United States arise from false conceptions and false constructions of the limitations the various States and Territories of the United States have placed, by their statutory declarations, upon the methods to comply with the short and explicit provision of section 2320, Revised Statutes of the United States, as follows:

"But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

The consensus of opinion of both the Federal and State courts have modified that declaration of the national statute far enough to permit a subsequent discovery to be made validating such a location prior to discovery, where no adverse rights occur.

Two limitations and restrictions have been placed by the statutes of the States of Colorado and of Montana, which have produced technical hindrances and embarrassments in the way of judicial interpretation of the simple prerequisite

of the United States statute requiring a discovery in the limits of the claim.

The Montana original territorial statute required the presence of one wall of the vein, and the State statute requires discovery shaft at least ten feet deep, showing "well-defined crevice or valuable deposit."

The Colorado statute, passed in territorial days, omits mention of the one-wall requirement of the Montana statute, but requires "a discovery shaft ten feet deep, showing a well-defined crevice."

The supreme court of Montana, Chief Justice McConnell presiding, in the case of

O'Donnell *vs.* Glenn, 8 Mont., 248; 19 Pac. Rep., 302, gives a very lucid interpretation of the force to be given to such requirements. We quote:

"It is argued by counsel of appellant that 'to allow the selection at will of any other shaft besides the nominal discovery shaft, when a location is contested, is to leave the whole matter open to uncertainty and doubt, and cause litigation. To allow it would be to allow a fraud upon the law, for, if a man may locate his discovery where there is no vein, he may place it at a point between two veins, when he would legitimately be entitled to but one.' The best answer to this argument is given in the Revised Statutes of the United States, wherein they provide that 'the location must be distinctly marked on the ground, so that its boundaries can be readily traced.' And further, that all 'records of mining claims * * * shall contain * * * such a description of the claim or claims located, with reference to some natural object or permanent monument as will identify the claim.'

"The fundamental mistake in the foregoing argument is that it assumes that a notice on the ground at the point of discovery is necessary when it is not required by law. All that is required is a genuine discovery of a mineral-bearing vein with at least one well-defined wall, and such a description of it in the

declaratory statement of record as will identify it and enable a person to easily trace its boundaries. Can it be said that because a locator of a mine puts up a notice at a shaft which contains no mineral, when he has discovered mineral at another point in the same vein and which is covered by his location, the boundaries of which can be readily traced, and the claim identified, that he cannot hold it for that reason? Certainly not. Such a holding would be to interpolate into the statute an amendment which would lead to most absurd consequences."

The Eulalia location stake and notice and discovery shaft, not over twelve feet deep, were placed, May 30, 1893, not over 400 feet west of the east end line of the Eulalia claim.

The Golden Rod location stake and notice and discovery shaft, not over twelve feet deep, were placed, January 25, 1894, not over 400 feet west of the east end line of the Golden Rod claim.

The two shafts claimed as the discovery shafts under the statutes of Colorado for these two claims were only four feet apart. The discovery notices were placed for each claim at these shafts and at no other place or places. Neither the appellants, plaintiffs below, nor the appellee, defendant below, introduced any evidence to prove a vein in the immediate vicinity of these twelve-foot holes, or even claimed by any of their offers of evidence that a vein or lode existed in those shafts.

To narrow the broad terms of the United States statute "of the discovery of the vein or lode within the limits of the claim located" to a point in a mining claim perhaps six feet by three feet, or a total of eighteen square feet in superficial area, out of the total area of a claim 1,500 feet long by 300 feet wide of an area of 450,000 square feet, is to practically repeal the United States statutes upon the subject of discoveries.

In these two claims, as located, an enforcement of the proposition that the discovery shaft named and claimed by the location certificate must disclose and discover within such shaft a well-defined crevice of rock in place, bearing gold or silver, would render the title to both of these claims absolutely void.

An "ideal location" of a lode mining claim under the Colorado statutes, the decisions of the General Land office, and the Revised Statutes of the United States would be an exact geometrical and mathematical parallelogram having its end and side lines parallel with side lines 1,500 feet long and end lines 300 feet long, and the "discovery shaft" mentioned in section 3152, Mills' Annotated Statutes of Colorado, accurately placed upon the center or middle line of the parallelogram, geometrically and mathematically 150 feet from each side line.

Judge Lindley (sec. 360, 1 vol., 2d edition 1903) says of such location:

> "The 'ideal location' is rarely encountered in the practical mining world but it furnishes a convenient standard with which the every-day location may be compared."

The ideal valid lode discovery shaft must, then, be accurately placed upon the center or middle line of this paral-

lelogram and must contain mineral in place at a depth of ten feet at least from the surface.

In section 345 of the first volume Judge Lindley, in discussing the relationship of the *discovery* to the discovery shaft, says:

"As Mr. Morrison in his Mining Rights tersely states, 'the fact of discovery is a fact of itself' to be totally disconnected from the idea of discovery shaft. The discovery shaft is a part of the process of location, subsequent to discovery."

In same section 345 he further differentiates:

"When we speak of the discovery shaft, we mean to include in that term the various equivalents provided for by the several State enactments as hereinbefore outlined."

In the same section 345 Judge Lindley, in discussing the necessity of discovery being confined to the discovery shaft, having in view the uncertain and unsatisfactory ruling of the supreme court of Colorado in the case of Beals *vs.* Cone, 27 Colo., 473, and of the court of appeals of Colorado, Fleming *vs.* Daly, 12 Colo. App., 439, this distinguished authority gives us a prophetic intimation of what view the Supreme Court of the United States would take of such a narrow and unreasonable construction of section 3152, Mills' Annotated Statutes of Colorado, in the following significant language:

"In neither of these cases was the court called upon to determine whether the State statute was objectionable on the ground that it conflicted with the requirements of the Federal statute. *It is possible that it would be held invalid on this account.*"

That Judge Lindley is not alone in the view that such a construction of section 3152, Mills' Annotated Statutes of Colorado, would be held invalid as objectionable under the requirements of section 2320, Revised Statutes of the United States, we quote from an opinion of Hon. Henry M. Teller,

who has no living peer as a mining lawyer and is almost the only living member of the Colorado General Assemblies who formed the Colorado, statute under consideration—the act of February 13, 1874. This opinion is in the case of Wight *vs.* Tabor, 2 L. D., 741:

"It is said that the statutes of Colorado, made in pursuance of the authority given by the act of May 10, 1872, require that there shall be a discovery in the discovery shaft. The provision is as follows:

"'By sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary to show a well-defined crevice.'

"If the legislature of Colorado had authority to require such discovery in the discovery shaft it is by the provision of section 2319, Revised Statutes, May 10, 1872. It may well be doubted whether the legislature of Colorado can attach such a condition to the appropriation of mineral lands, when the national statute only provides for the discovery of mineral within the claim. * * * It is the discovery of mineral that entitles the discoverer to a claim; it is equally meritorious whether discovered in the discovery shaft or in any other part of the surface ground of his claim, as the national statute is silent as to where it shall be found."

Again, in Snyder on Mines, vol. I, sec. 347:

"It has been held that the location must rest upon what is found in the discovery shaft, and that ore found elsewhere would not be sufficient (citing Van Zant *v.* Argentine Co., 8 Fed., 725), but this decision has been departed from, if it can be said that it was ever controlling, and in the later cases, both in Federal and State courts, a locator may abandon the original discovery and rest his claim upon a discovery made subsequent and elsewhere in the claim."

Citing—

Perigo *vs.* Erwin, 85 Fed. Rep., 904.
Silver City M. Co. *vs.* Lowry, 19 Utah, 334.
Brewster *vs.* Shoemaker, 28 Colo., 176.

Again, Snyder on Mines, sec. 353, vol. I, Discovery of mineral elsewhere on the claim:

"As we have already had occasion to remark (*ante*, sec. 347), not to repeat too often, but in order to show the reason of the rule the discovery of mineral elsewhere on the claim, if adopted and taken as and for the discovery, will likewise rescue the location from the failure of title otherwise resulting from loss of discovery. The reason of this rule is obvious and proceeds from the theory that all the law of Congress requires is proof that the ground sought to be claimed as mining ground and sought to be patended as such contains either a lode or vein of mineral-bearing rock in place as applied to lode claims and gold placer or valuable deposit, as herein outlined and defined as applied to other claims, whence it follows that it can make no difference at what point in the claim this discovery is made so long as it demonstrates the truthfulness of the claim and a discovery, although not in the discovery shaft, is sufficient as a basis for a location."

O'Donnell *vs.* Glenn, 8 Mont., 248.

Judge Robert Morrison in the eleventh edition of his Mining Rights, p. 33, discusses the topic, Lode found outside of discovery shafts:

"It has been decided in some of the States that although no lode was found in the discovery shaft, its disclosure elsewhere within the claim before any adverse rights had accrued would validate the claim."

Harrington *vs.* Chambers, 1 Pac., 362.
Aff., 111 U. S., 350.
North Noonday Co. *vs.* Orient Co., 9 M. R., 529; 6 Saw., 299; 1 Fed., 522.

But to the contrary in Colorado under its statute are the cases of—

Van Zant *vs.* Argentine Co.
Terrible M. Co. *vs.* Argentine Co., 4 M. R., 441; 89 Fed., 583.
Aff., 122 U. S., 478.

"The question has been before the supreme court of Colorado in two cases which refer to the point without any satisfactory or consistent ruling upon it."

Beals *vs.* Cone, 27 Colo., 499.
Healy *vs.* Rupp, 28 Colo., 102.

We insert the short opinion of Judge Hallett, which it is claimed by Judge Morrison confines the proof of vein of mineral to the discovery shaft.

HALLETT, District Judge (orally):

"That the plaintiff bringing his action to recover possession of the mining claim, must show a good location in compliance with the statute in respect to locations; *i. e.* he must show in his discovery shaft a vein or lode of valuable ore in rock in place, as well as compliance with the statute in other regards. The miner is not bound to make the first shaft or opening which he may sink his discovery shaft. If after sinking in one place and failing to find a lode, he sinks in another and finds one he may make the second his discovery shaft, on which location may be based; that it is competent for him to make any shaft he may sink his discovery shaft, but it must disclose a lode or vein in rock in place, not simply mineral in a fragmentary condition. A location is held valid only to the extent of the lode which is included within it. If a location is extended beyond the limits of the lode, in so far as it goes beyond the lode it is held invalid for the reason that the location gives no right to the surface except in connection with the lode."

Van Zant or Terrible Min. Co. *vs.* Argentine M. Co.,
5 McCrary, 639; 89 Fed., 583.
Aff., 122 U. S., 478.

On affirmation in the Supreme Court of the United States Justice Field does not discuss the question, confining his opinion to question of dip.

The supreme court of Colorado has practically assumed what we claim is the true and harmonious construction of section 3152, Mills' Annotated Statutes, and section 2320, Revised Statutes of United States.

In the case of Fisher *vs.* Seymour, on appeal twice from the district court of Lake county and reported in

16 Colo., 188, and
23 Colo., 542,

one of the turning points of the case passed upon the question of the validity of the American Flag Lode location, the undisputed evidence in the case being that no vein or lode had been discovered in the American Flag "*discovery shaft,*" but that prior to the location of the Tiger lode a vein and lode had been discovered in the Fisher shaft within the limits and boundaries of the American Flag lode.

On page 546 of the second decision of this case, in 23 Colo. Rep., appears the diagram or map of the claims, which was introduced in evidence on the trial, and an examination of this diagram in connection with the record and decision clearly demonstrates that the only discovery of mineral in place within the boundaries of the American Flag claim was made, not in the so-called American Flag *discovery shaft*, fifty or sixty feet from the south end line of the American Flag claim and 150 feet distant from each side line, as located and recorded, but was made in the Fisher shaft, marked upon the diagram with a large "cross," this shaft being 800 feet from the south end line, 50 feet from the west side line, and 250 feet from the east side line of the American Flag claim as located and recorded, and within its boundaries.

The court says, page 550:

"In this shaft mineral of commercial value was found, this being the only ore at that time disclosed upon either of the claims."

At page 552 the court says:

"An examination of the transcript shows the fact to be established by competent evidence, and undisputed, that a vein of mineral was discovered upon the American Flag

claim prior to the relocation of the Little Tiger lode under the name of the Tiger, and this is sufficient to validate the American Flag location from the date of such discovery."

The discovery of the lode and vein of mineral upon the American Flag claim, about which there was no dispute, was made between the first day of January and the last day of March, 1880, just shortly before the death of Thomas Fisher, which occurred April 10, 1880, as shown by the record, and was made in what is called the Fisher shaft, and is marked on the diagram by a large cross, and was sunk by Mr. Fisher to a depth of forty or fifty feet before his demise, and this Fisher shaft never was the shaft set out in the location certificate of the American Flag claim as the technical discovery shaft, that location certificate having been recorded June 24, 1879, over six months prior to the discovery as made in the Fisher shaft, the distance between the two shafts being not less than 750 feet.

This decision is entirely in line with

O'Donnell *vs.* Glenn, 8 Mont., 248; 19 Pac., 302;
Harrington *vs.* Chambers, 1 Pac., 362;

thus placing Montana, Utah, and Colorado together upon this important point of construction.

Colorado Statutes.

The act of February 9, 1866, of the Colorado territorial statutes was in the following words:

"And the discoverer or discoverers shall, before recording, excavate thereon a shaft at least ten feet deep or deeper, if necessary to find a well-defined crevice, or forfeit all right and title he or they may have acquired by virtue of such discovery."

Taken alone, without other legislation, the legislative intent at that time was in substance:

That the vein or lode must be found by the claimant not less than ten feet below the surface of the earth.

The later legislation of February 13, 1874, adds the word "discovery" in the adjective or qualifying sense and limits its time for sinking the shaft so mentioned to the period before filing the location certificate.

The pertinent sections of the act of February 13, 1874, of the Colorado territorial statute which is the present State statute, are as follows:

"3150. The discoverer of a lode shall, within three months from the date of discovery, record his claim in the office of the recorder of the county in which such lode is situated, by a location certificate which shall contain:

"First. The name of the lode.

"Second. The name of the locator.

"Third. The date of location.

"Fourth. The number of feet in length claimed on each side of the center of discovery shaft.

"Fifth. The general course of the lode as near as may be."

"3152. Before filing such location certificate the discoverer shall locate his claim by:

"First. Sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary, to show a well-defined crevice.

"Second. By posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery.

"Third. By marking the surface boundaries of the claim."

"3154. Any open cut, cross-cut or tunnel which shall cut a lode at the depth of ten feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft."

Construed harmoniously and together, the legislative intent of sections 3152 and 3154 is twofold:

1. That the vein or lode must be found by the claimant not less than ten feet below the surface of the earth, and that it may be disclosed at any discovery shaft, shaft, open cut, cross-cut, or tunnel within the limits of the claim.

2. That the markings of the claim upon the ground must be such that the boundaries can be readily traced.

The first branch of this intent was to conform to section 2320, Revised Statutes of the United States, reading:

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located"

and this is exclusively made for the benefit of the United States, so that land cannot be acquired under this law until its character is first ascertained to be mineral.

The second branch provides a form of staking and record which infallibly apprises a junior locator of the presence of the stakes and the recorded claim of a prior locator, and that those going upon the ground may know that others have acquired and claim title thereto.

It is plain, then, that if a vein is actually present and disclosed in an opening or shaft below a depth of ten feet from the surface, necessarily the discovery of the vein and crevice parts of both statutes have been complied with, and all that remains for the locator, "if he has made this discovery or has knowledge of it in any other way," for we can hardly term him a discoverer of a vein disclosed and uncovered many years before, is that he shall have a point of commencement for his newly surveyed claim, and to comply with the statute he must sink a new ten-foot hole, which in the case at bar became in truth and fact only a location shaft; and as in this instance he places it 150 feet from each side line, how can he be said to have failed to comply with both intents of the statute? Indeed, when we consider the location of abandoned fractional claims like the Winter and Pocket

Liner lodes, absolutely surrounded by patented and located claims with positive and determined rights, Mr. McMillen was limited to this line for his discovery shaft if he wished to cover all the ground formerly inclosed in the original Winter lode, as surveyed in 1879. It does not detract from the strength of this position to call the attention of the court to the fact that the junior locator's grantors of defendant in error located their discovery shaft—location shaft; call it what you will—within four feet of the shaft of plaintiffs in error eight months subsequent to the Eulalia location, and maintained it there from January 25, 1894, to March 8, 1895.

Where the narrow technical construction of the objects and purposes of the discovery shaft in mining legislation obtains, you will hear this proposition announced:

"If no discovery need be found within the discovery shaft, it follows logically that there is no need of a discovery shaft."

Plainly such an argument overlooks the equally important requisites of the mining State legislation:

1. A point at which to commence the survey along the center line of the claim and upon each side of the center, which our statute declares to be in the majority of the counties not exceeding 150 feet.

2. A point at which a notice of discovery and claim is placed, with a shaft at least ten feet deep, thus making a permanent opening in the ground to be easily known as the starting point of the survey, this point being used as a monument to tie the corner posts of the claim.

Surely these other uses and purposes of the discovery shaft, as mentioned in the statute, are equally of prime importance in estimating the objects of the requirement.

The following ruling of the district court of the fifth judicial district of Colorado has been uniform and continuous

under all of the judges at different times presiding in Lake county:

"That although a discovery of mineral in rock in place is a necessary prerequisite to a valid location of a lode mining claim, yet such discovery does not necessarily have to be made in the location or discovery shaft. If a valid discovery of mineral in rock in place is made within the boundaries of the claim before any adverse rights have accrued, this would make his location a valid and legal one."

This is the instruction asked by plaintiffs in error of the trial judge and refused. (See R., fol. 36, p. 21.) The instruction in the record is *verbatim et literatim* the same instruction given by the same trial judge in the case of Healy *vs.* Rupp, 63 Pac., 319; 28 Colo., 102, and is mentioned in the opinion. The Mr. Robert B. Estey mentioned as Rupp's lessee of the Canestota lode in dispute in Healy *vs.* Rupp, in whose behalf the instruction was first given by the same trial judge, is the same Robert B. Estey who appears as president of the Ferrum Mining Company. (See R., fol., 290–291, p. 179.)

And this ruling has never permitted the claimant to escape compliance with the other condition of location, having a ten-foot shaft designated in the statute "discovery shaft," from which his survey started on the course of the claim and marking its actual surveyed width and the point where the discovery notice was and is to be placed.

The statute law never contemplates the doing of a useless or foolish thing, and yet it is possible to state a multitude of conditions where such acts would be required from the narrow construction of the uses and purposes of a discovery shaft.

Let us suppose that a shaft has been sunk to a depth of 1,000 feet by parties seeking a vein upon unappropriated mineral ground of the United States; that at the bottom of such shaft a vein of mineral has been encountered; that afterwards no steps are taken to secure a United States pat-

ent, and there is a cessation of the annual labor thereon for a period of ten or twenty years, the property becomes that familiar thing known in all mining territory, "abandoned and jumpable." Upon the dump are the evidences of the mineral vein discovered under perhaps a thousand feet of porphyry, sand rock, shale, lime, webergrits, or perhaps wash. The shaft is filled with water. A prospector comes along who formerly worked in this identical shaft and knew of the discovery and disclosure of this vein at a depth of 1,000 feet. Will it be contended for a moment that he must take out of that shaft the immense volumes of water and sink that shaft ten feet deeper, or be limited to finding another vein in the limits of this claim at ten feet from the surface which he must call his discovery shaft? By no means. The discovery of a vein within the meaning of the United States statute, for all his purposes has been made so that he can adopt it as his own, and the fact that the vein has been found ten feet or more below the surface complies to a dot with the additional legislation of the State of Colorado. He has completed his discovery under the grants of the United States to its citizens as fully and completely as Columbus was entitled to his contract rights in the New World from Ferdinand and Isabella.

Does the record of this case in the trial court and in the supreme court of the State of Colorado show that the express right, title, privilege, and immunity to prove the existence and discovery of a vein and lode at any point and place within the surveyed and claimed limits of their location under section 2320 of the Revised Statutes, which says: "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," and to prove the discovery and existence of a lode and vein of gold and silver ore within the limits of their Eulalia Lode mining location antecedent to and prior to their location of said ground upon the 30th day of May, A. D. 1893, and the recording of their location certificate upon June 17, 1893,

whether made and discovered by themselves or other parties, and that they knew and claimed, at the time of making their location, that there had been a discovery of a vein or lode within the limits of their location under section 2320 of the Revised Statutes of the United States, was claimed and presented before judgment, and that such express right, title, privilege, and immunity was denied to them, and was the construction put upon sections 3150, 3152, and 3154, Mills' Annotated Statutes of Colorado, adverse to and in opposition to the rights of plaintiffs in error under section 2320 of the said statute of the United States, and was this right and immunity denied by the rulings of the courts and the judgment rendered, and was that the necessary effect in law of the judgment?

Does the record disclose that they were denied the privilege and right to prove the existence of a vein or lode outside of the place and point designated as the "discovery shaft" in their location certificate, recorded June 17, 1893, and within the limits of their Eulalia lode as surveyed, by the construction the said courts placed upon sections 3150, 3152, and 3154, Mills' Annotated Statutes of Colorado, and did such construction conflict with the requirements of the Federal statute, section 2320?

Does the record disclose that the construction placed by these courts on section 3152, Mills' Annotated Statutes, render the said section invalid, in so far as it conflicts with section 3154, Mills' Annotated Statutes, and section 2320, Revised Statutes of the United States? Under such construction, which section of the two sections, 3152 and 3154, is valid under section 2320, Revised Statutes of the United States?

We give the refused instructions asked by plaintiffs in error in the trial court and the excluded testimony of Messrs. Thompson, Connors, Smith, and McInness, with the offers of counsel to prove the discovery of a vein and lode in the Pocket Liner shaft by Samuel McMillen and his

partners in 1879 and 1880, and also to prove the discovery of an ore vein and the shipping of the same in October, November, and December, 1894, from the southeast fraction of the Eulalia lode, 380 feet from the surface, through the Little Vinnie lode. These refusals of instructions and exclusion of testimony were sustained by the supreme court of Colorado, save and except in this, that in its opinion the court stated:

"When the trial court ruled that a valid discovery could not be made from an opening on another claim or Government land, it was error."

We claim that these refusals and exclusions were made against and adverse to the plaintiffs in error's express rights, privileges, titles, and immunities under section 2320 of the Revised Statutes of the United States, as well as a false and inconsistent construction of sections 3150, 3152, and 3154, Mills' Annotated Statutes, against the law and the decisions that should have governed and controlled their rulings and judgment in this case.

INSTRUCTION No. 2.

"The court further instructs the jury that, although a discovery of mineral in rock in place is a necessary prerequisite to a valid location of a lode mining claim, yet such discovery does not necessarily have to be made in the location or discovery shaft. If a valid discovery of mineral in rock in place is made within the boundaries of the claim before any adverse rights have accrued, this would make his location a valid and legal one" (R., fol. 36, p. 21).

INSTRUCTION No. 4.

"The court further instructs the jury that in a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show, not only a location upon the ground in due form of law, but also to show that the location was made upon a vein or lode of quartz or other rock

in place, bearing mineral, with the discovery or knowledge on the part of the locator, before the location was made, of the existence of mineral. And under section 2320 Revised Statutes of the United States, the locator of a mining claim is not required to be the original discoverer of the vein or lode. If at the time of making the location there is the discovery of a vein or lode of quartz or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location, even though the discovery was first made by some one other than the locator" (R., fol. 38, p. 22).

No. 5.

"The court further instructs the jury that it is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode, in order to make a valid location.

"It is sufficient if it be clearly shown that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location, but it must be known to him and claimed by him in order to give validity to the location" (R., fol. 39, p. 22).

Instruction No. 8.

"The court instructs the jury that if you believe from the evidence in this case that prior to the 25th day of January, A. D. 1894, the plaintiffs, or their grantors, were in the quiet and undisputed possession of the premises designated in the complaint as the 'Eulalia lode,' claimed by the defendant as the 'Golden Rod lode;' that upon May 30th, 1893, long prior to said 25th day of January, A. D. 1894, plaintiffs or their grantors posted on the surface a plain sign or notice containing the name, 'the Eulalia lode,' the name John Kennedy, the locator, and the 30th day of May, 1893, the date of location; that the plaintiffs or their grantors so marked the boundaries of said Eulalia Lode claim by the erection of six substantial stakes, hewed or marked on the sides in toward the claim and sunk in the ground, one at each corner and one at the center of each side line so as to be readily traced, and that on or about June 17, 1893, and within ninety days of said 30th day of May, A. D. 1893, the

said plaintiffs duly recorded a location certificate containing the name of the lode, the name of the locator, the date of location, the number of feet in length claimed on each side of the center of discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, and sank a discovery shaft thereon, to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface; and that theretofore there had been discovered within said boundaries a vein or lode of quartz or other rock in place, bearing gold, silver, or other precious metals, then this constitutes a *prima facie* case for the plaintiffs which can only be overcome by the defendant by proof of subsequent abandonment or forfeiture, or other divestiture and the acquisition of a better right or title by the defendant and its grantors."

R., fol. 42, p. 25.

INSTRUCTION No. 9.

"The court instructs the jury that if they believe from the evidence that no lode, ledge or vein of quartz or other rock in place bearing gold, silver or other precious metals had been disclosed and discovered in the discovery shaft of the Eulalia lode or in the shaft known as the Pocket Liner shaft prior to the location of the Eulalia lode upon the 30th day of May, 1893, either by the plaintiffs herein, their grantors or or some of them, or by third parties with the knowledge of such discovery by plaintiffs herein, their grantors or some of them, and if they believe further from the evidence that no lode, ledge or vein of quartz or other rock in place bearing gold, silver or other precious metals had been disclosed and discovered in the Golden Rod discovery shaft or in the shaft known as the Pocket Liner shaft by the defendant or its grantors and if the jury believe from the evidence that the plaintiffs herein their grantors or some of them discovered a vein lode or ledge of quartz or other rock in place bearing gold silver or other precious metals at a depth greater than ten feet below the surface of the earth in the part or portion of said premises as designated by them as the southeast Eulalia fraction prior to any other discovery by defendant or its grantors; you are instructed that such discovery by plaintiffs relates back to the time of the original survey and location of the said Eulalia lode and

enables the plaintiffs and their grantors to hold the claim against all who had not acquired interests in the lode and premises at the time the acts were performed and your verdict will then be for the plaintiffs."

R., fol. 43, pp. 25–26.

EVIDENCE OF THOMAS H. THOMSON.

"Q. Will you state what you found in that shaft in the year 1879?

"Objected to by defendant as incompetent, immaterial and not tending to prove any issue in the case.

"The COURT: Let us hear from you, Mr. Elder, why you want to show what was in that shaft.

"The jury were thereupon excused for thirty minutes.

"Mr. ELDER: The proposition of the plaintiffs is simply this: That Mr. McMillen, as an owner and a locator of the Eulalia lode, knew at the time he placed his stake upon the Eulalia claim on the 30th of May, 1893, that he, in company with his co-owners of the Pocket Liner claim, had discovered ore in the shaft of the Pocket Liner claim; that at the moment that he placed this stake upon that ground claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States and of the State of Colorado, and that that knowledge within the mind of Mr. McMillen constituted a complete, final, and perfect location of that mining claim, provided he did the other things requisite under the statutes of the State of Colorado, by sinking a discovery shaft ten feet in depth, etc., etc.

"'The COURT: I cannot agree with you. Our statute is clear as to what is required, and it has become almost elementary. You must go either upon the vein and make your discovery or you must go into the shaft in which the vein has already been discovered and do some work. The objection will be sustained.'

"To which ruling of the court plaintiffs, by their counsel, then and there duly excepted."

R., fols. 169, 170, pp. 101, 102.

EVIDENCE OF STEPHEN CONNORS.

"Q. Will you state if you remember what were the contents, not the number of ounces, will you state whether that assay showed the presence of gold and silver within that rock that you gave to the assayer."

"Objected to by defendant for a great many reasons, the first one is what occurred in 1879 is immaterial."

"And the court sustained said objection, to which ruling of the court plaintiffs duly excepted."

R., fol. 176, p. 106.

EVIDENCE OF W. L. G. SMITH.

"Q. Will you state if you have made a correct map of the underground workings of the Eulalia lode on the side line of the Little Vinnie lode? A. I did.

"Q. Have you such a map? A. Yes.

"Q. Is this the map, sir?

"Mr. CAVENDER: I object to that; it appears from the testimony that is underground working from the Little Vinnie claim into the Eulalia claim. We object upon the ground that it is improper to make a showing in such workings, and there is no testimony of any working through the Little Vinnie claim that can be proved to show a discovery of mineral in this case; in other words, a discovery in one claim cannot be made through the workings of another; that you cannot make a secret discovery under the statutes of this State, especially with reference to relocations.

"Mr. ELDER: Now, if your honor please, we are offering this in evidence to show that in the year 1894 Mr. Ronald Morrison, Mr. John McCombe and Mr. Samuel McMillen, the owners of that property, did their annual assessment upon the Eulalia lode from the underground workings of the Little Vinnie lode.

"Second. We offer that in case of the working of the Eulalia lode and the shipping of ore or the discovery of mineral in either the drift, or the stopes above the drift during the period of the year 1894; that would be a sufficient discovery of mineral in the failure of a discovery by other parties prior to that period of time, and that such a discovery would inure to and relate back to the original location of

this claim upon the ground, and in support of that proposition I desire to call the court's attention to a case within the last year, heard in your honor's court, in which a discovery was made underground from the Price shaft, and in which I believe Mr. Estey was interested, and which discovery was made underground from a shaft formerly upon the conflicting location.

"The COURT: Connected to the surface through their ground in that case, if I remember.

"Mr. ELDER: So there is a connection through the Little Vinnie shaft.

"The COURT: But not through Eulalia ground. You should offer this for two purposes, and I am not passing upon the first purpose at this time. You should offer it first to show the assessment work and you should offer it next to prove a discovery.

"Mr. ELDER: If necessary we will prove an ample discovery in the other shaft.

"The COURT: Well, it is a second string to your bow. If you should offer it to prove a discovery you must in some way show that it was accessible from the ground claimed by you and on which it is intended to constitute the discovery. In other words, you must have had an opening to the surface on that ground which would have made or constituted visible notice to somebody intending to locate that a discovery might exist at the bottom of that opening, which would put them on their guard and be notice to them which they would be compelled to accept and could not plead ignorance of.

"Mr. ELDER: Does your honor hold that the United States statute requires any such thing?

"The COURT: I hold most emphatically this, *that you cannot have a secret or concealed discovery from an opening on another claim or on Government land.*

"Mr. ELDER: Does the court assume that this was a secret discovery of any kind?

"The COURT: There was nothing, as far as I see the evidence now. I may be mistaken. This particular part which you point out which appears to be colored light blue, you have shown no opening from the Eulalia ground connecting with that drift. Perhaps I can explain the position to you in this way: Suppose I had been walking over the Eulalia claim with the idea of seeing what there was on the ground,

believing it to be vacant, unoccupied domain; that drift might have existed there, and undoubtedly did exist, 300 or 400 feet under ground, and yet it would not give me the slightest notice. There must be something on the ground to give notice of a discovery to constitute a discovery.

"Mr. ELDER: Then your honor rules that our complete conformance to the location requirements of the United States statutes and the statutes of Colorado with reference to staking and having a discovery shaft is not sufficient notice to the world of our claim of the property.

"The COURT: What I hold, Mr. Elder, at this time is, that you cannot introduce evidence of that drift for the purpose of establishing a discovery on the Eulalia ground unless you show an opening or visible connection with the surface of the Eulalia ground which would have constituted notice to any one intending to locate the same. Now I am not passing upon your assessment work.

"Mr. ELDER: I would like the court to pass on the assessment work.

"Mr. EWING: We will concede they did $100 worth of work within the boundaries of the claim in the year 1894.

"The COURT: Then you don't need any offer on that point.

"Mr. ELDER: Now, as to the second offer, the court at the present time rules that we cannot introduce that map for the purpose of showing a discovery from the underground workings of the Little Vinnie claim.

"The COURT: Unless you can show an opening to the surface of the Eulalia claim.

"To which ruling of the court plaintiffs, by their counsel, then and there duly excepted.

R., fols. 153, 155, 156, 157, 158, pp. 92, 93, 94.

"M. N. McInnis, witness for plaintiff, pp. 58 and 59, Abstract—Miner; have mined upon Breece hill; mined on the Little Vinnie in December, 1894; am familiar with the underground workings of the Little Vinnie, yes, sir, part of it; and familiar with what is known as the 380-foot level of the Little Vinnie.

"Q. Do you know of any work having been done from that level towards the Eulalia Lode claim in the fall? A. We have an upraise; we have a stope there in that level.

"Q. Did you see any ore on the line of the Eulalia lode—common line of the Little Vinnie and the Eulalia lode?

"Objected to by defendant.

"The COURT: What is the purpose of it?

"Mr. ELDER: We are going to prove we shipped ore from that ground.

"The COURT: They will perhaps admit that you did.

"Mr. EWING: No, we will not admit that; but this comes under the same objection.

"And the court sustained such objection.

"The Court has already decided that such a drift does not constitute a discovery.

"To which ruling of the court, plaintiffs, by their counsel, duly excepted."

R., fol. 160, p. 95.

We print portions of the opinion of the supreme court of Colorado upon the two main questions:

"1. The ground covered by the two claims is substantially identical. It was formerly included within the limits of the Winter lode, and a part of it was afterwards embraced within the exterior lines of the Pocket Liner lode. When, in 1893, plaintiffs' grantor went upon the ground, both of these claims were abandoned, and he proceeded to relocate as an abandoned claim the territory theretofore covered by them, and adopted the boundaries and stakes of the Winter location. He sank a discovery shaft to the depth of about 12 feet, and at the alleged point of discovery posted his location stake, and in due time filed for record his location certificate, in which, as we read it, the discovery is designated as in the discovery shaft. At the trial plaintiffs admitted that this discovery shaft did not disclose a well-defined crevice. On the contrary, they conceded that it had not passed through the wash and débris usually encountered upon Breece hill in the Leadville mining district. Notwithstanding that no discovery was in fact made in the discovery shaft, and the further fact that the location, as made, was based upon such alleged discovery, plaintiffs contend that since their grantor, the locator, at the time he sought to appropriate the ground as the Eulalia lode, knew of the existence of a vein within the limits of that claim as surveyed, but several hundred feet distant from the discovery shaft of the Eulalia, which he, together with his co-owners of the Pocket Liner lode, had previously discovered in the process of its develop-

ment, this knowledge was equivalent to an actual discovery by him of a vein within the Eulalia location. That plaintiffs' contention may be correctly stated here, though it involves some repetition, we quote what their counsel said when asked by the trial court his purpose in offering proof of a former discovery and in the Pocket Liner lode:

"'Mr. ELDER: The proposition of the plaintiffs is simply this: That Mr. McMillen as an owner and a locator of the Eulalia lode knew, at the time he placed his stake upon the Eulalia claim on the 30th of May, 1893, that he, in company with the co-owners of the Pocket Liner claim, had discovered ore in the shaft of the Pocket Liner claim; that at the moment that he placed his stake upon that ground, claiming the Eulalia claim as abandoned and unoccupied territory, that theretofore there had been a discovery of mineral within the requirements of the statutes of the United States, and of the State of Colorado, and that that knowledge within the mind of Mr. McMillen constituted a complete, final, and perfect location of that mining claim, provided he did the other things requisite under the statutes of the State of Colorado, by sinking a discovery shaft ten feet in depth,' etc. And again, in the printed briefs, counsel for appellants says: 'We claim for appellants that the discovery made by one of them—Samuel McMillen—in the Pocket Liner shaft, while the same was being sunk in the years 1879 and 1880, formed a complete compliance and performance of one of the two prerequisites prescribed by the acts of Congress to vest in him the complete possessory title to the Eulalia Lode mining claim, and that his entry upon the 30th of May, 1893, and distinctly marking the said claim on the ground and sinking a discovery shaft over a depth of ten feet completed the other prerequisite to vest the title in him.' That the rulings of the trial court may also correctly appear, we take the liberty of reproducing what the judge said in reply to an attempt on the part of plaintiffs to show a discovery made by them in performing assessment work and doing certain other work subsequent to filing their location certificate. 'You can,' said the judge, 'prove this, if possible—any discovery which you made on that ground. I care not where it is, or in what shaft it is. If you have made a discovery, prove it.' And again: 'If, in 1895, you made a discovery upon that ground, and you claim under that discovery, you may go to work and prove

your claim under that discovery.' From the foregoing it is apparent that learned counsel for appellants (plaintiffs below) contends that mere knowledge by the Eulalia locator of the existence of a vein in the Pocket Liner made his location valid, provided he performed the other statutory acts of location aside from the actual discovery of mineral."

The trial judge was entirely against plaintiffs in error throughout the whole case, and what the supreme court mentions as the apparent fairness is entirely specious. Not one of the offers of material evidence of plaintiffs in error was allowed to be proven or the questions even answered by the witnesses.

Our contention was that Mr. McMillen's knowledge of the presence and existence of a vein of gold and silver ore in the Pocket Liner shaft on the day he set his stake and commenced his work of location and survey, May 30, 1893, was of the widest and most extensive character ever used by any of the learned judges who have expressed the term, and it could not be otherwise, since Mr. McMillen was upon the ground in 1879 and 1880, when the iron-stained quartz, talc, and vein material was coming out of the Pocket Liner shaft. We used it advisedly in as strong a form as Judges Sawyer, Hawley, and Ross, of the United States bench, and Justices McFarland, Bartch, and McConnell, of the supreme courts of California, Utah, and Montana, in the cases where this doctrine is announced and discussed. We are mindful of the fact that this would not avail plaintiffs in error if the point of occurrence of the lode in the Pocket Liner shaft did not exceed ten feet below the surface.

We recognize the authority of the laws of the State of Colorado in the matter of survey, staking, recording of location certificates, and the necessity of a discovery shaft, but we also concede to the appropriator the right to prove a prior discovery in, at, and within any part of the superficial and underground surface of the ground within his location boundaries; and we further contend that the two sections of

the Colorado statutes, 3152 and 3154, Mills' Annotated Statutes, can be harmoniously construed to that effect in full accord with section 2320, Revised Statutes of the United States. The mining laws are beneficial laws. They should not be, and are not by the United States Supreme Court, construed technically. The history of the laws shows, as well as the constructions of the Supreme Court of the United States upon them, that they were intended to afford to the miner the most simple method possible of discovery, appropriation, and development.

"It has been held that it is not necessary that the locator of a mining claim should be the first discoverer of a vein or lode in order to make a valid location. If it appear that the locator knew at the time of making his location that there had been a discovery of a vein or lode within the limits of his location, he may base his location upon it, and thus avoid the necessity of making a discovery for himself. The following are some of the cases: Book *v.* Justice Mining Co. (C. C.), 58 Fed., 106, 108; Jupiter M. Co. *v.* Bodie Cons. M. Co. (C. C.), 11 Fed., 666; 7 Sawy. 96; Conway *et al. v.* Hart, 129 Cal., 480; 62 Pac., 44; Hayes *v.* Lavagnino, 17 Utah, 185; 53 Pac., 1029; Werner *v.* McNulty, 7 Mont., 30; 14 Pac., 643; O'Donnell *v.* Glenn, 8 Mont., 248; 19 Pac., 302; Nevada Sierra Oil Co. *v.* Home Oil Co. *et al.* (C. C.), 98 Fed., 673. But as stated by Judge Ross in the Oil Company case, *supra.*, not not only must the locator 'have knowledge of the former discovery, but such actual discovery must be adopted and claimed by him in order to give validity to his location;' that is to say, the locator must claim and adopt such previous discovery as his own, and base his location upon it. In the O'Donnell case, *supra*, the supreme court of Montana, it is true, held that the locator was not confined to the nominal discovery shaft, but might select some other place within the limits of the location, and show a valid discovery there. But that decision, as the opinion clearly shows, was based upon section 2320 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1424], which merely provides that 'no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located,'

and the supreme court of Montana aptly observed that there is no provision for a discovery shaft in the Federal statute or any statute of Montana. The court further said that the fundamental mistake in the argument of counsel that a locator was not permitted to select at will any shaft besides the nominal discovery shaft was 'that it assumes that a notice on the ground, at the point of discovery, is necessary when it is not required by law.' Obviously, had there been in Montana, as there is in Colorado, a statute which specifically declares that the locator shall sink a discovery shaft to the depth of at least 10 feet, showing a well-defined crevice, and shall also post at the point of discovery a location stake, the decision there would have been otherwise. And, whatever our views might be when the question is presented, it is a fair inference from the opinion in that case that where, in States that have provisions for discovery shafts and posting of notices on the ground, like our statute, the locator himself selects the discovery shaft as the one in which the discovery of mineral has been made, and there posts his location stake, and bases his location upon such discovery, he may not, after intervening rights have attached, abandon and disregard the same, neglect to comply with such provisions, and select another discovery upon which his location was not predicated. Now, when tender of proof was made by plaintiffs' counsel of the former discovery, there was no offer to show that it was claimed by their locator or adopted by him as the one on which the Eulalia location was made. For this reason alone the court was justified in refusing to hear the proof offered, for it did not meet the requirements of the decisions in which the doctrine is laid down that a former discovery may be the basis of a valid location. It is true that in tendering instructions plaintiffs submitted one which contained the element of an adoption by the relocator of a former discovery as the one upon which his own location was based. There was no error by the trial court, however, in refusing to give this instruction, because there was no evidence, or offer of evidence, by plaintiffs, that called for it. The fact that plaintiffs' grantor knew and claimed that there had been a former discovery is not equivalent to, nor does it supply the place of, its selection by him as the one on which his location is based, particularly in the light of the declaration in the location certificate that the discovery of

the Eulalia location was made in a discovery shaft in no way connected with, and some hundred feet distant from, the place where the former discovery is said to have been made. It follows from what we have said that plaintiffs have not brought themselves within the doctrine they contend for, and are not in a position to invoke its application to their case as made."

It seems that the trial court below and the supreme court of Colorado are unmindful of the fact that section 2320, Revised Statutes, is the basic principle from which all decisions on discovery must flow, and the supreme court of Montana was acting advisedly when it based its opinion in the O'Donnell case upon section 2320. We could wish in this case that the supreme court of Colorado could also understand its limitations. We challenge the law and the logic of the inference the court has drawn from the posting of the notice; being a final determination of the only point where the locator can prove his discovery from, we claim he has every square foot of the superficies of his claimed location, and every cubic foot of its depth, and that this claim is under section 2320, Revised Statutes.

The court says:

"Now, when tender of proof was made by plaintiff's counsel of the former discovery there was no offer to show that it was claimed by their locator or adopted by him as the one on which the Eulalia location was made."

An effective answer, and one which the supreme court of Colorado is the last body to confute, is that in the case of Treasury T. M. & R. Co. *vs.* Boss, 74 Pac. Rep., 888, supreme court, Colo., the court decided December 7, 1903, that the posting of such notice is not necessary. In that case the turning point of the whole case was upon the absence of the notice at the point of discovery proved in the case. We quote from that opinion:

"That although a valid discovery of mineral was made, and the required discovery work done within the limits

of the Maggie A location before the relocation of the Liverpool, yet the locator of the former did not post, at the point of such second and only valid discovery on the surface of the ground a sign or notice which it is said section 3152 Mills' Annotated Statutes requires shall be done."

In conclusion, the court reversed the finding of the lower court for the Liverpool lode and ordered judgment for the Maggie A lode. Further comment is unnecessary on that branch.

It does not seem to have passed into the mind of the court that Mr. McMillen's discovery work within the lines of his Eulalia claim under the decisions had been accomplished many years before and was fully the equivalent, under the decisions, of any new work he could do.

"2. There is another reason for holding that plaintiffs may not avail themselves of that rule. It appears that they not only do not question the validity of our State statutes which prescribe certain acts as necessary to a valid location, but in their complaint they aver that in the location of the Eulalia lode the provisions of the State, as well as of the Federal, statutes were complied with; and among the instructions which they themselves asked the court to give was one—applicable both to their own and the Golden Rod location—in which was the declaration that, as provided by section 2152, Mills' Annotated Statutes, a valid location of a lode mining claim cannot be made unless the locator sinks a discovery shaft upon the lode discovered to a depth of at least 10 feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary, to show a well-defined crevice, and unless he posts at the point of discovery on the surface a location stake containing certain designated things. Such being true, plaintiffs certainly cannot now be heard to say that they may at their will disregard these mandatory provisions of State legislation, which they themselves have invoked, for, if we assume their validity (which plaintiffs themselves do not question, and which they declare they have complied with), the discovery shaft must expose the vein upon which the location of the Eulalia lode was based, or at least one vein; and a dis-

covery elsewere within the limits of the claim will not supply its place. Beals *v.* Cone, 27 Colo., 473, 499; 62 Pac., 948; 83 Am. St. Rep., 92. Lindley on Mines, at section 250 (15), says that State courts have uniformly enforced provisions like those of ours concerning discovery shafts and posting of notices, notwithstanding doubts by the Interior Department, as to their validity. See, also, Van Zandt *v.* Argentine M. Co., 8 Fed., 725; 2 McCrary, 159; Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S., 478; 7 Sup. Ct., 1356; 30 L. Ed., 1140, and Morrison's Mining Rights (9th ed.), 29. But as already shown, plaintiffs are not questioning their binding force and are not in a position to do so."

We refer to the former portion of our brief for a discussion of this branch of the opinion.

We have unhesitatingly questioned the validity of the court's unwarranted construction of sections 3152 and 3154 of Mills' Annotated Statutes of Colorado, for the reason that one statute must fail under the court's construction and that is section 3154. By the holding of the court in this very case section 3154 was not construed with section 3152. The court gives no reason for its selection of the most technical part of this act of February 13, 1874, as the one to be most rigidly enforced. We have before said, and say now, that a harmonious construction of the two sections together can bring them in consonance with the liberal terms of section 2320, Revised Statutes of the United States, and we do now challenge the validity of section 3154 as construed by the Colorado supreme court as invalid in its conflict with section 2320, Revised Statutes of the United States. It is just such narrow, strained, and contracted constructions that have filled the courts of the mining States with protracted and indefinite litigation.

The actual steps of location, discovery, and appropriation of mining claims are very simple; the intricacies are those found in the constructions made by the courts of the States and Territories wherein mineral lands are situated. The Supreme Court of the United States has time and again

cleared away a vast amount of technicality sought to be thrown around these laws, as a careful perusal of the decisions of that court will show.

"3. From what has already been stated, it is clear that the trial court did not preclude plaintiffs from showing a valid discovery of mineral within the limits of the Eulalia location before the rights of defendant attached, though from a superficial examination of the record the contrary might appear. The assertion that defendant has failed to establish a valid location is not borne out by the evidence. Defendant's proof in that behalf is amply sufficient to show a valid location, assuming, as the record justifies, that plaintiffs' location was invalid."

We fear that the court failed to catch our reference to what might have occurred if the jury had been sent down the east drift of the Pocket Liner shaft, where these magnificent Marconi wireless selvages and cracks in the rock were imagined into veins.

All through this opinion we find the court inferentially claiming that plaintiffs in error never adopted the discovery of the vein in the Pocket Liner shaft. We say now, without any fear of contradiction, that no higher force of adoption could be made than by surveying the claim, posting a notice on it at the central fraction of the three pieces and filing a location certificate, and then, when their title is challenged by a jumping junior locator, instead of hiding behind a proneness to file additional and amended location certificates, coming into court and proving an opened and discovered vein in the claim which one of their number discovered over thirteen years before. Do the surveyor's stakes which plaintiffs in error placed about the claim mean no definite adoption and appropriation of every foot of the ground, and does their recorded location certificate carry no notice of their claim?

Second. Plaintiffs in error were entitled, under section 2320 of the Revised Statutes of the United States and section

3154, Mills' Annotated Statutes, to introduce evidence to prove that in September, October, November, and December, 1894, they drove a drift from the workings of the Little Vinnie Lode mining claim at a point 380 feet from the surface of the earth into the southeast fraction of their Eulalia claim a distance of over 64 feet, and also constructed and opened certain upraises and stopes within the limits of their Eulalia location where they discovered, disclosed, and opened a large and valuable vein of gold and silver bearing ore in rock in place, and from this vein shipped large quantities of gold and silver bearing ore to the smelters, and that the refusal of the trial court to permit such proof and the ruling of the supreme court of Colorado in sustaining such refusal put a construction upon section 3152, Mills' Annotated Statutes, in direct conflict with section 2320 of the Revised Statutes of the United States, which says:

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located,"

which was adverse to and in opposition to the rights of plaintiffs in error under said statute and in direct contravention of plaintiffs in error's express right, title, privilege, and immunity under said statute to prove the existence, presence of, and discovery of a vein and lode at any point and place within the surveyed and claimed limits of their location; and that construction, in so far as it was based upon section 3152, Mills' Annotated Statutes of Colorado, rendered the same nugatory, invalid, and objectionable to section 2320 of the United States Revised Statutes, and that such ruling was also in contravention of their vested rights under section 3154, Mills' Annotated Statutes of Colorado, which is section 2403, page 733, General Statutes of Colorado, 1883, which reads as follows:

"Any open cut, cross-cut, or tunnel which shall cut a lode at the depth of 10 feet below the surface, shall hold such

lode the same as if a discovery shaft was sunk thereon, or an adit of at least 10 feet in and along the lode from the point where the lode may be in any manner discovered shall be equivalent to a discovery shaft."

Evidence Introduced to Prove Underground Discovery.

"W. L. G. Smith, being called as a witness for the plaintiffs and duly sworn, testified as follows:

"Direct examination by Mr. Elder:

"Q. Mr. Smith, what is your occupation? A. Mining engineering.

"Q. What was your occupation along about October, November and December and January, 1894 and 1895? A. Mining engineering.

"Q. Were you employed along in about that time to survey along the lines of the Little Vinnie lode what is known as the Eulalia lode? A. I was.

"Q. Who by? A. Ronald Morrison.

"Q. Will you state if you have made a correct map of the underground workings of the Eulalia lode on the side line of the Little Vinnie lode? A. I did.

"Q. Have you such a map? A. Yes.

"Q. Is this the map, sir?

"Mr. Cavender: I object to that; it appears from the testimony that is underground working from the Little Vinnie claim into the Eulalia claim. We object upon the ground that it is improper to make a showing in such workings, and there is no testimony of any working through the Little Vinnie claim that can be proved to show a discovery of mineral in this case; in other words a discovery in one claim cannot be made through the workings of another, that you cannot make a secret discovery under the statutes of this State, especially with reference to relocations.

"Mr. Elder: Now, if your honor please, we are offering this in evidence to show that in the year 1894 Mr. Ronald Morrison, Mr. John McCombe, and Mr. Samuel McMillen, the owners of that property, did their annual assessment upon the Eulalia lode from the underground workings of the Little Vinnie lode.

"Second. We offer that in case of the working of the Eulalia lode and the shipping of ore or the discovery of mineral in either the drift or the stopes above the drift during the period of the year 1894, that would be a sufficient discovery of mineral in the failure of a discovery by other parties prior to that period of time, and that such a discovery would inure to and relate back to the original location of this claim upon the ground. And in support of that proposition I desire to call the court's attention to a case within the last year heard in your honor's court in which a discovery was made under ground from the Price shaft and in which I believe Mr. Esty was interested, and which discovery was made under ground from a shaft formerly upon the conflicting location.

"The COURT: Connected to the surface through their ground in that case, if I remember.

"Mr. ELDER: So there is a connection through the Little Vinnie shaft.

"The COURT: But not through Eulalia ground. You should offer this for two purposes, and I am not passing upon the first purpose at this time. You should offer it first to show the assessment work, and you should offer it next to prove a discovery.

"Mr. ELDER: If necessary we will prove an ample discovery in the other shaft.

"The COURT: Well, it is a second string to your bow. If you should offer it to prove a discovery you must in some way show that it was accessible from the ground claimed by you and on which it is intended to constitute the discovery. In other words you must have had an opening to the surface on that ground which would have made or constituted visible notice to somebody intending to locate that a discovery might exist at the bottom of that opening which would put them on their guard and be notice to them which they would be compelled to accept and could not plead ignorance of.

'Mr. ELDER: Does your honor hold that the United States statute requires any such thing?

"The COURT: I hold most emphatically this, that you cannot have a secret or concealed discovery from an opening on another claim or on Government land.

"Mr. ELDER: Does the court assume that this was a secret discovery of any kind?

"The COURT: There was nothing as far as I see the evidence now, I may be mistaken; this particular part which you point out which appears to be colored light blue, you have shown no opening from the Eulalia ground connecting with that drift.

"Perhaps I can explain the position to you in this way: Suppose I had been walking over the Eulalia claim with the idea of seeing what there was on the ground, believing it to be vacant, unoccupied domain; that drift might have existed there, and undoubtedly did exist, 300 or 400 feet under ground, and yet it would not give me the slightest notice. There must be something on the ground to give notice of a discovery to constitute a discovery.

"Mr. ELDER: Then your honor rules that our complete conformance to the location requirements of the United States statutes and the statutes of Colorado with reference to staking and having a discovery shaft is not sufficient notice to the world of our claim of the property.

"The COURT: What I hold, Mr. Elder, at this time is, that you cannot introduce evidence of that drift for the purpose of establishing a discovery on the Eulalia ground unless you show an opening or visible connection with the surface of the Eulalia ground which would have constituted notice to any one intending to locate the same. Now I am not passing upon your assessment work.

"Mr. ELDER: I would like the court to pass on the assessment work.

"Mr. EWING: We will concede they did $100 worth of work within the boundaries of the claim in the year 1894.

"The COURT: Then you don't need any offer on that point.

"Mr. ELDER: Now, as to the second offer, the court at the present time rules that we cannot introduce that map for the purpose of showing a discovery from the underground workings of the Little Vinnie claim.

"The COURT: Unless you can show an opening to the surface of the Eulalia claim.

"To which ruling of the court plaintiffs, by their counsel, then and there duly excepted.

R., fols. 152–158, pp. 91–94.

"M. M. McInnes being called as a witness for the plaintiffs and duly sworn, testified as follows:

"Direct examination by Mr. ELDER:

"Q. What is your occupation? A. Miner.

"Q. Where have you mined in this camp? A. Mined up on Breece hill.

"Q. Where were you mining in December, 1894? A. On the Little Vinnie.

"Q. Are you familiar with the underground workings of the Little Vinnie? A. Yes, sir; part of it.

"Q. Are you familiar with what is known as the 380-foot level of the Little Vinnie? A. Yes, sir.

"Q. Do you know of any work having been done from that level towards the Eulalie lode claim in the fall? A. We have an upraise, we have a stope there in that level.

"Q. Did you see any ore on the line of the Eulalie lode—common line of the Little Vinnie and the Eulalie lode?

"Objected to by defendant.

"The COURT: What is the purpose of it?

"Mr. ELDER: We are going to prove we shipped ore from that ground.

"The COURT: They will perhaps admit that you did.

"Mr. EWING: No, we will not admit that; but this comes under the same objection.

"And the court sustained said objection. To which ruling of the court plaintiffs by their counsel duly excepted.

"The COURT: The court has already decided that such a drift does not constitute a discovery."

R., fol. 195, p. 95.

The offer of the map of the underground workings, Exhibit 24 (R., fol. 153, p. 92), and evidence, M. N. McInnes, was made also in support of and to connect the ore shipped from a lode and vein found in the southeast fraction of the Eulalia claim from the 380-foot level. The court had previously refused to receive in evidence Exhibit No. 1, smelter settlement (R., fol. 75, p. 46); smelter settlement book, Exhibit 10 (R., fol. 102, p. 61); receipt, Exhibit 10 (R., fol. 101, p. 60); control assay certificate, Exhibit 7 (R., fol. 96,

p. 57); weighmaster's bill, sampler's bill, check Union Smelting Co., deposit book Ronald Morrison, daily balance book Leadville savings and deposit bank, and these offers were to connect the ore so shipped with the work upon the vein and lode opened from the 380-foot level of the Little Vinnie lode by Ronald Morrison, one of the plaintiffs in error.

OPINION OF COLORADO SUPREME COURT ON THIS BRANCH OF THE CASE.

"2. Appellants again call to our attention their assignments of error directed against the rulings of the trial court refusing their offer of proof of a discovery within the limits of the Eulalia, made through the underground workings of the Little Vinnie claim. In the original opinion no special reference was made to this position because the radical defects in appellants' proof as shown by their offer and by the record did not seem to us to call for an application of the rules of law invoked. Further investigation, particularly in the light of the oral arguments on this rehearing clearly demonstrates the fallacy of this claim. As we have aleady determined, appellants' location of the Eulalia has no standing at all if based upon a former discovery, made in 1879, or upon the one alleged to be made in May, 1893, at the time they went upon the ground and made their location, and which is admitted to be in the wash which covers the side of the mountain. At the trial, though no such claim is made in the complaint, there was an attempt to show a valid discovery made from the adjoining Little Vinnie lode. When the trial court ruled that a valid discovery could not be made from an opening on another claim or Government land, it was error; but, in view of the facts on which appellants themselves admit their present contention is founded, such ruling was not prejudicial, for the reasons which we now state. If it be granted that such a discovery was made, appellants wholly failed to follow it up by doing the other essential things which we said in Brewster *v.* Shoemaker, 28 Colo., 176; 63 Pac., 309; 53 L. R. A., 793; 89 Am. St. R., 188, should be done in order to perfect an underground discovery. This underground

discovery is said to have been made between the months of September and December, 1894. If so, we fail to see how it can avail the appellants, for earlier in the year of 1894 the appellee, as the jury must have found, and as the evidence abundantly shows, made a valid discovery in the old Pocket Liner shaft within the present boundaries of the Golden Rod location. This discovery, as well as the location based upon it, is prior to that of appellants, whether or not the law requires in such circumstances an amended or additional location certificate to be filed. If the law does not require such filing, appellee's location of the Golden Rod is superior to the Eulalia, for the former is first in point of time; but, if such location certificate must be filed, still appellee must prevail, for appellants have never filed such certificate at all, and appellee, in March, 1895, filed its amended location certificate, in which it bases its location upon the discovery made in the Pocket Liner shaft. It therefore conclusively follows, according to the facts as appellants themselves on the oral argument admit them to be, that there was no prejudicial error on the part of the trial court in rejecting appellants' offer of proof of a subsequent underground discovery, since, if it was made, it was not until after appellee had made a valid discovery and perfected its location of the Golden Rod."

While the supreme court found that it was error for the trial court to hold that a valid discovery could not be made from an opening on another claim or Government land, the court concluded it was not prejudicial error. The two reasons given were:

(1.) That no notice was posted on the surface at the point where the vein was discovered.

(2.) That defendant in error had a prior valid discovery in the Pocket Liner shaft.

We claim that the information which the law requires the owners of the Eulalia lode to give the public was complete when they placed a discovery notice and location notice upon a stake at their discovery shaft, when they marked

their claim distinctly upon the ground by four corner posts and two side center stakes, all correctly marked, and when, upon June 17, 1893, they recorded their location certificate in the recorder's office in Lake county, Colorado.

In the case of

Noyes *vs.* Mantle, 127 U. S., 348,

the Supreme Court of the United States has announced what these acts amount to when ground so located is attempted to be claimed by a subsequent placer locator:

"Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode."

Our supreme court has expressly and conclusively recognized the right of a discoverer of a lode made from an adjoining claim by and through a cross-cut, a tunnel, or a level, the opening to which is entirely off of the ground so located.

The case is

Hall *vs.* Kearny, 18 Colo., 505; 33 Pac. Rep., 373.

No error was found, either by the trial court or the supreme court, in the fact that the vein discovered was found from a cross-cut, tunnel, or level not having its opening upon the surface of the John Randolph claim, so held by such discovery. We quote from Judge Hayt's opinion:

"It is also contended that plaintiffs committed a trespass in locating the John Randolph claim, and for this reason it is sought to invalidate that location. The facts upon which this is predicated are as follows: One James Hall, the owner of a claim adjoining the Nolan-Gilmer claim, had driven a prospecting tunnel for the development of his

claim. Plaintiffs obtained permission from Hall to continue this tunnel for the purpose of developing the Nolan-Gilmer claim. They continued the tunnel across the Nolan-Gilmer patent without finding a lode, but, *upon extending it a few feet beyond the west side line of that location, they did discover a lode, which they located as the John Randolph.* It is claimed that their rights in the tunnel were limited by their contract with Hall, and that any discovery made in the public domain to the west of the Nolan-Gilmer claim would inure to appellant, he being Hall's grantee as to such rights. In other words, it is urged that as the Randolph location had its origin in the discovery in the tunnel, in equity it belonged to Hall. This is entirely outside any issue made by the pleadings. If in fact appellee's license only authorized them to extend the tunnel through the Nolan-Gilmer territory, *this did not prevent them from locating the lode discovered in the tunnel beyond the side lines of said claim,* although this was not contemplated by their license."

In Brewster *vs.* Shoemaker, 28 Colo., 176, the supreme court of Colorado says:

"Certainly there is no requirement of the Federal statute that a vein shall be discovered from the surface. The only requirement in that respect is that the place of discovery shall be within the limits of the claim. Under our statute (Mills' Annotated Statutes, section 3154, General Statutes, 1883, section 2403) where a lode is cut at a depth of 10 feet below the surface by means of an open cut, cross-cut or tunnel, it is the same as if a discovery shaft were sunk on the vein to that depth."

Again, page 180:

"The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided only all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery then following, it would be a useless and idle ceremony, which the law does not require, for the locators again to locate their claim and refile their location certificate or file a new one."

Having so thoroughly stated our position on the question of these posted notices, we leave that question just where it belongs, saying this: that where a claim of title as lode ground is once made on the ground by posting a notice of claim it is large enough and broad enough to preserve the rights of claimant to any underground veins he may discover within his location.

The second reason given by the court—that defendant in error had a prior valid discovery—is not borne out by the record and evidence in the case.

In the original opinion in this case the supreme court labored manfully that the plaintiffs in error should not be allowed to prove their knowledge and claim of an ore vein in the Pocket Liner shaft at the date of their location and record of their location certificate, June 17, 1893, for the reason that in that location certificate plaintiffs in error had based their location and designated their discovery shaft as near the Winter discovery shaft, some 400 feet from the east end line of the claim. By the time he had demolished the claim of title of plaintiffs in error by such excellent reasoning, and when the petition for rehearing was being considered, the court suddenly discovered that the Ferrum Mining Company was most certainly in the same dilemma, as in their amended location certificate, filed December 14, 1904, they continued to base their location and designated their discovery shaft in the same place and locality as their first one of January 29, 1904. See Defendants' Exhibit G (R., fols. 290–291, pp. 179–180).

This location certificate, under the first strenuous reasoning of the court, designated their twelve-foot shaft adjoining the location shaft of plaintiffs in error as the actual discovery shaft of defendant in error, and it so continued up to and until March 8, 1895, when the first and original claim of the Pocket Liner shaft as their new discovery shaft was made. Whether such first claim is made by posting notice

or by filing another amended and additional location certificate, it did not antedate March 8, 1895.

There has never been any doubt in the minds of plaintiffs in error that the filing of this amended location certificate was caused by the ascertained fact that plaintiffs in error were working upon their discovered vein and lode from the 380-foot level of the Little Vinnie claim and were shipping pay ore from their Eulalia Lode claim.

We hardly think our claim will be disputed that the underground discovery made in the fall of 1894 by plaintiffs in error, long prior to March 8, 1895, validated any alleged errors or defects in the title of plaintiffs in error to their Eulalia Lode claim, and we believe it will be so adjudged to them.

Third. Plaintiffs in error have pursued their writ under the third clause of the jurisdiction act, section 709.

Section 709, third clause:

"Where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up and claimed by either party under such Constitution, statute, commission or authority."

Plaintiffs in error are attempting to hold property under the mining grants of Congress, as the prior and senior locators and appropriators of unsold vacant Government mineral land, and they allege that by a conflict in construction of section 3152, Mills' Annotated Statutes of Colorado, as against section 2320, Revised Statutes of the United States, by the supreme court of Colorado, an express right, title and immunity arising to plaintiffs in error under section 2320, Revised Statutes, has been denied them; that such section 3152, Mills' Annotated Statutes of Colorado, as so construed by the supreme court of Colorado, is invalid and objectionable to said section 2320.

We have set forth at large the matters and things denied plaintiffs in error in the lower courts in the former part of this brief, and as we understand the facts in each case, under the decisions, are the final test of its reviewability, we place the matter in the court's hands.

We believe that upon examination of the record this court will decide to review the judgment of the supreme court of Colorado in this behalf rendered, and that it will find proper and meritorious grounds to reverse the same.

Respectfully submitted,

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Attorney for Plaintiffs in Error.